

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American
Judges Association

American Judges Association

2011

Court Review, Volume 47, Issue 3 (Complete)

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>

"*Court Review*, Volume 47, Issue 3 (Complete)" (2011). *Court Review: The Journal of the American Judges Association*. 357.

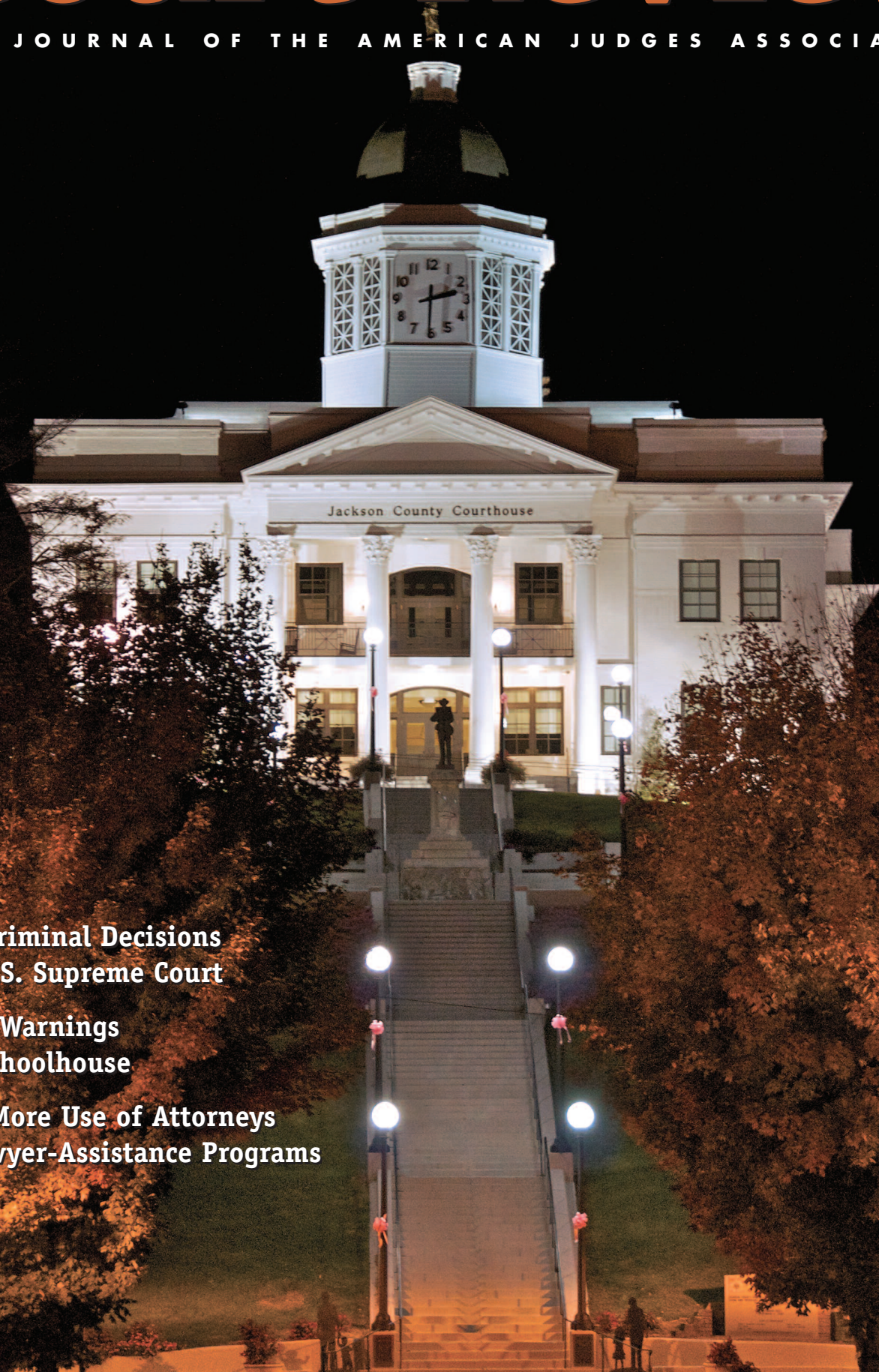
<https://digitalcommons.unl.edu/ajacourtreview/357>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in *Court Review: The Journal of the American Judges Association* by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Court Review

Volume 47, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION



**Recent Criminal Decisions
of the U.S. Supreme Court**

**Miranda Warnings
in the Schoolhouse**

**Making More Use of Attorneys
from Lawyer-Assistance Programs**

Court Review

Volume 47, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

T A B L E O F C O N T E N T S

EDITORS

Judge Steve Leben
Kansas Court of Appeals

Professor Alan Tomkins
University of Nebraska

ASSISTANT TO THE EDITORS

Kate Lorenz
Kansas Court of Appeals

EDITORIAL BOARD

Kelly Lynn Anders
Creighton University

Judge Karen Arnold-Burger
Overland Park, Kansas

Judge B. Michael Dann
National Institute of Justice

Julie Kunce Field
Fort Collins, Colorado

Mark D. Hinderks
Leawood, Kansas

Judge Leslie G. Johnson
American Institute for Justice

Steven Lubet
Northwestern University

Judge Gregory E. Mize
Washington, D.C.

Elizabeth Neeley, Ph.D.
University of Nebraska

NATIONAL CENTER FOR STATE COURTS STAFF

Charles F. Campbell
Managing Editor

ARTICLES

- 52** Selected Criminal Law Cases in the United States Supreme Court and
a Look Ahead

Charles D. Weisselberg

- 64** Lawyer-Assistance-Program Attorneys and the Practice of
Therapeutic Jurisprudence

David B. Wexler

- 68** Reading, Writing, and Interrogating: Providing Miranda Warnings to
Students in Schoolhouse Interrogations

Stephanie Forbes

DEPARTMENTS

- 50** Editor's Note

- 51** President's Column

- 76** The Resource Page

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 47, Issue 3

2011

EDITOR'S NOTE

The lead article in this issue is Professor Charles Weisselberg's annual review of the criminal decisions for the past Term of the United States Supreme Court. As always, there are a number of cases that are significant, and Professor Weisselberg has placed them in context for us. By reading this article each year, you can stay on top of the past year's key developments, and Professor Weisselberg also previews the key cases now pending before the Court.

Our next article is from one of our old friends, Professor David Wexler. He's written several articles in the past for *Court Review*, and we devoted a special issue to therapeutic jurisprudence—the field he helped create—back in 2000. (You can find that issue on our website at <http://ajancsc.dni.us/publications/courtrv/cr37/cr37-1/cr37-1.pdf>.) In his current article, Professor Wexler makes a rather modest suggestion that could pay large dividends: Why not take advantage in criminal and other cases of the experience of lawyers who help other lawyers with substance-abuse problems through lawyer-assistance programs? Give it some thought, and feel free to correspond with Professor Wexler (davidbwexler@yahoo.com) about the idea.

Our final article tackles when *Miranda* warnings may be required in schoolhouse interrogations. Many schools have law-enforcement officers in-house these days, and questions about the interactions between those officers and students are more frequent. Stephanie Forbes, a recent graduate of the William & Mary School of Law, wrote this article, which was the winning entry in the American Judges Association's 2011 writing competition for law students.

I will close by calling your attention to an AJA-sponsored national symposium set for May 18 in Nashville—*The Politicization of the Judiciary: How to Respond*. This symposium will address an issue critical to judges today, and you will have a chance to interact with the leading experts in the area. Take a look at page 76 and the inside back cover for details.—Steve Leben



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 45 of this volume (the preceding issue). *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact January Serda at (757) 259-1864.

Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo is the Jackson County Courthouse in Sylva, North Carolina. The former courthouse is now part of the Jackson County Public Library Complex, which opened in June 2011. The courthouse was built in 1913 and served as a courthouse until 1994. The building, listed on the National Register of Historic Places, is situated on a hill at the end of Main Street; 107 steps lead up from a fountain in front of the courthouse to its front portico.

©2011, American Judges Association, printed in the United States. *Court Review* is published quarterly by the American Judges Association (AJA). AJA members receive a subscription to *Court Review*. Non-member subscriptions are available for \$35 per volume (four issues per volume). Subscriptions are terminable at the end of any volume upon notice given to the publisher. Prices are subject to change without notice. Second-class postage paid at Williamsburg, Virginia, and additional mailing offices. Address all correspondence about subscriptions, undeliverable copies, and change of address to Association Services, National Center for State Courts, Williamsburg, Virginia 23185-4147. Points of view or opinions expressed in *Court Review* are those of the authors and do not necessarily represent the positions of the National Center for State Courts or the American Judges Association. ISSN: 0011-0647.

Cite as: 47 Ct. Rev. ____ (2011).

President's Column

Kevin S. Burke

If every court achieved 99.9 percent quality for litigants, should we be satisfied? In other endeavors, if 99.9 percent was the standard of excellence, the IRS would lose two million documents this year, 3,056 copies of tomorrow's *Wall Street Journal* would be missing one of three sections, and 12 babies would be given to the wrong parents each day. For those industries, 99.9 percent is not good enough and it cannot be acceptable for courts either. Judicial excellence is a mindset. It must be an obsession or, as Aristotle said, "Quality is not an act. It is a habit."

Today being a judge is a 24/7 job. Judges are viewed as leaders in our community. We are, in a sense, role models in an era where it is very difficult to be a role model. The political rhetoric of our time has become so heated and polarized that trust and confidence in courts is jeopardized. The high-spending judicial races of some states are problematic but, lest anyone become complacent, even in Canada there are instances of political figures rather unfairly criticizing courts.

None of us should be so naïve as to expect agreement on the vision or justice we seek. Judges will and should have disagreements, but we must have those debates about our vision for justice in a manner that fosters public confidence. We need to unify around a common vision for judicial excellence.

Judicial excellence comes in part when we provide procedural fairness. One hundred percent of the time we must insist people in our courts are listened to, treated with respect, and understand our orders. Popular dissatisfaction with courts is fueled not just by rhetoric, but by performance. In a democratic society, judges have no control over political speech that is critical of courts or even downright wrong and malicious. But we can control our own performance.

The American Judges Association took a leadership role in the journey toward judicial excellence when we adopted the white paper on procedural fairness in 2007. Four years later a lot of judges (far more than our membership) have seen our work and/or participated in educational programs focused on procedural fairness. But more needs to be done.

To achieve judicial excellence, we need to commit to getting judges honest and reliable feedback. While a very strong case can be made that the performance measure of procedural fairness should be public, no justification can be made that no data on our performance be kept lest it somehow become public. CourTools Measure One for trial courts, developed by the National Center for State Courts, provides an easy template to gather the data on the court's accessibility and its treatment of customers in terms of fairness, equality and respect. (Go to http://www.ncsconline.org/D_Research/CourTools/index.html to look at it.)

Second, we need to learn from social scientists and others who study our work. My hope is that next fall the American

Judges Association can be presented with a second white paper that focuses on how to improve judicial decision making. AJA partnered with the National Center for State Courts in a grant application to the State Justice Institute to fund the necessary research for that paper, and SJI has funded the grant. If the American Judges Association motto, the Voice of the Judiciary®, is to be meaningful, we must speak with authority and wisdom in our quest for judicial excellence.

Tightening budgets cripple innovation and fear of failure inhibits risk-taking. But fear is among our greatest obstacles to judicial independence and excellence. In his book *The Assault on Reason*, Al Gore wrote:

Fear is the most powerful enemy of reason. Both fear and reason are essential to human survival, but the

relationship between them is unbalanced. Reason may sometimes dissipate fear, but fear frequently shuts down reason. As Edmund Burke wrote in England 20 years before the American Revolution, "No passion so effectually robs the mind of all its powers of acting and reasoning as fear." Our Founders had a healthy respect for the threat fear poses to reason. They knew that, under the right circumstance, fear can trigger the temptation to surrender freedom to a demagogue promising strength and security in return. They worried that when fear displaces reason, the result is often irrational hatred and division. As

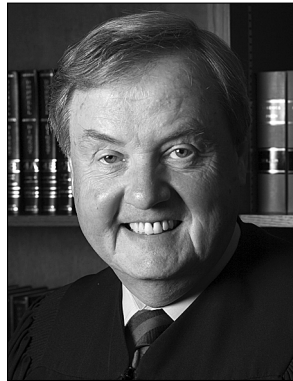
Justice Louis D. Brandeis later wrote, "Men feared witches and burnt women."

Courts are dynamic institutions—at least they are capable of being dynamic—but if the times in which we live lead judges to fear that innovation and change are too risky, we will likely suffer, but more importantly the communities we serve will suffer. The judges who started drug courts, mental-health courts, domestic-violence initiatives, or family-court reform could not know at the outset that these initiatives would succeed. In each instance, there were plenty of skeptics. But those initiatives occurred and were eventually successful because the judges who started them were not paralyzed by a fear of failure.

Decades ago, Robert F. Kennedy said,

There is a Chinese curse which says, "May he live in interesting times." Like it or not, we live in interesting times. They are times of danger and uncertainty; but they are also the most creative of any time in the history of mankind. And everyone here will ultimately be judged—will ultimately judge himself—on the effort he has contributed to building a new world society and the extent to which his ideals and goals have shaped that effort.

We do live in interesting times. And in Robert Kennedy's words, my hope is for all of us that we will be judged and judge ourselves as committed men and women who sought to build a judiciary committed to excellence 100 percent of the time.



Selected Criminal Law Cases in the United States Supreme Court and a Look Ahead

Charles D. Weisselberg

Perhaps to most observers, the blockbusters from the United States Supreme Court's 2010-2011 Term were on the civil side of the docket. Yet the Court did address a number of important aspects of policing and criminal prosecutions, such as the Fourth Amendment and exigent circumstances, *Miranda* and juveniles, and the Confrontation Clause. I believe that the most significant criminal-law-related rulings from the past Term may turn out to be the Court's habeas corpus cases. The justices issued a series of opinions that interpret the federal habeas statutes to afford greater deference to state courts and that make it more difficult for federal petitioners to obtain evidentiary hearings. This article reviews the leading criminal-law-related opinions of the Supreme Court's 2010 Term, emphasizing those decisions that have the greatest impact on the States, including the habeas rulings. The article concludes with a brief preview of the current Term.

FOURTH AMENDMENT

The justices issued three significant Fourth Amendment decisions this past Term. In *Kentucky v. King*,¹ the most notable of the trio, the Court ruled that a warrantless search of a home may be supported by exigent circumstances even if those circumstances were created by police. The other opinions addressed substantial questions about retroactivity and the exclusionary rule, and about allegations of pretextual arrests.

In *King*, officers conducted a controlled buy of crack cocaine outside an apartment complex. The seller then moved quickly to the breezeway of an apartment building. Before police could get there, he entered one of two apartments off of the breezeway. Officers smelled marijuana smoke coming from the apartment on the left. They knocked and announced their presence and, hearing noises inside, believed that drug-related evidence was about to be destroyed. The officers then entered the apartment and found drugs and other contraband. The defendant, King, was charged with narcotics offenses. But it was the wrong apartment. When police eventually entered the apartment on the right, they found the suspected cocaine seller. The Kentucky Supreme Court found that the search of the apartment on the left was impermissible, saying that "police cannot 'deliberately creat[e] the exigent circumstances

with the bad faith intent to avoid the warrant requirement,'" and that officers may not rely on exigent circumstances if it was "reasonably foreseeable" that the tactics used by police would create the circumstances in the first place.² In an 8-1 decision written by Justice Alito, the Supreme Court reversed.

The majority noted that warrantless searches are allowed "when the circumstances make it reasonable . . . to dispense with the warrant requirement."³ The exigent circumstances rule justifies a warrantless search when the conduct of the officers before the exigency "is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed."⁴ The Court did not further explain what it meant by "engaging or threatening to engage in conduct that violates the Fourth Amendment," but it acknowledged the "strong argument" that the exigent circumstances rule might not apply where the police "without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted."⁵

The Court also expressly rejected a number of rules formulated by lower courts that have limited the reach of the exigent circumstances doctrine. Among the rules rejected by the majority were those that ask whether officers deliberately and in bad faith created the exigent circumstances; whether it was reasonably foreseeable that the investigative tactics would create the exigent circumstances; whether officers had probable cause and time to secure a warrant; and whether the investigation was contrary to standard or good law enforcement practices.⁶ The key question, said the majority, was simply whether officers were where they were entitled to be and whether they gained entry by means of an actual or threatened violation of the Fourth Amendment.⁷ The majority then remanded for the state court to decide whether there actually were exigent circumstances on the facts of this case, though the Court also rejected the defendant's characterization that officers had threatened to enter without a warrant if the occupants did not voluntarily open the door.

Justice Ginsburg dissented, arguing that the Court "today

Footnotes

1. 131 S.Ct. 1849 (2011).
2. *Id.* at 1855 (quoting *King v. Commonwealth*, 302 S.W.3d 649, 656 (Ky. 2010)).
3. *Id.* at 1858.
4. *Id.* at 1858.
5. *Id.* at 1858 n.4.

6. *See id.* at 1858-62.

7. *See id.* at 1858 (noting that officers may seize evidence in plain view or seek consent to search if they are a place where they are lawfully entitled to be); *id.* at 1862 (officers may knock on a door and ask to speak with an occupant just as a private citizen may knock).

arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."⁸ In her view, the exigent circumstances exception to the warrant requirement should be more narrowly cabined, and she faulted officers for not seeking a warrant when they had probable cause and time to obtain it.⁹

Davis v. United States,¹⁰ another Fourth Amendment case with a majority opinion authored by Justice Alito, concerns whether the exclusionary rule applies when officers rely on prior precedent in objectively good faith. Many courts had read *New York v. Belton*¹¹ as authorizing an automobile search incident to arrest whether or not the arrestee was within reaching distance of the car at the time of the search. Two Terms ago, the Court decided *Arizona v. Gant*¹² and held that an officer may conduct an automobile search incident to an arrest only if the arrestee was within reaching distance of the car during the search or if officers had reason to believe that evidence relevant to the crime of arrest was within the vehicle. The search in *Davis* took place before *Gant*.

The Court ruled 7-2 that the exclusionary rule did not apply to this search. The majority emphasized that the sole purpose of the exclusionary rule was to deter future Fourth Amendment violations and that prior decisions limited the rule's operation to situations in which deterrence was most effectively served. The Court said that real deterrent value was a necessary, but not a sufficient, condition for exclusion and that the analysis also must take into consideration the substantial social costs generated by the rule. Acknowledging that a number of prior cases did not take such a "discriminating" approach, the justices said that the Court has abandoned an older "reflexive" application of the exclusionary rule and has "imposed a more rigorous weighing of its costs and deterrence benefits."¹³ Thus, "[p]olice practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'"¹⁴ In the case at bench, binding precedent specifically authorized the search that turned up the gun, and "[a]bout all that exclusion would deter in this case is conscientious police work."¹⁵

But the principal argument by Davis and the dissenting justices was that the case should turn on retroactivity principles. Under *Griffith v. Kentucky*,¹⁶ new criminal procedure decisions apply to cases that are pending on direct appeal or not yet final. The majority turned aside this argument, distinguishing between the retroactive application of the substantive Fourth Amendment holding in *Gant* and the remedy that follows such an application. Thus, the Court found that the search violated the Fourth Amendment under *Gant*, but principles of retroac-

tivity did not require application of the remedy of exclusion where the purposes of the exclusionary rule would not be effectively advanced. The majority also rejected the claim that this would stunt the development of Fourth Amendment law because defendants would have no incentive to ask a court to reconsider Fourth Amendment precedents.

Justice Sotomayor concurred. She pointed out that the case did not present the question of whether the exclusionary rule applies where the law governing the constitutionality of the search is unsettled. On the facts of this case, binding authority specifically authorized the search.

Justice Breyer dissented, joined by Justice Ginsburg. While agreeing that the substantive holding of *Gant* applied retroactively, the dissenters argued that the majority's distinction between the retroactive application of the rule and the availability of the remedy is highly artificial and counter to precedent.¹⁷ The dissenters sharply disagreed with the broad use of a culpability test to determine the application of the exclusionary rule. They expressed fear for the future of the exclusionary rule, arguing that if an officer's culpability is determinative and if the Court "would apply the exclusionary rule only where a Fourth Amendment violation was 'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule."¹⁸ Further, "our broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction."¹⁹ And Justices Breyer and Ginsburg were concerned that the Court's ruling will make it difficult for lower courts to reconsider prior decisions.²⁰

Another important Fourth Amendment case was *Ashcroft v. al-Kidd*.²¹ In 2003, al-Kidd was arrested as a material witness pursuant to a warrant. The warrant alleged that al-Kidd had information crucial to a prosecution, and he was arrested checking in for a flight to Saudi Arabia. Al-Kidd was held for 16 days and then placed on supervised release for more than a year. He never was called as a witness. Al-Kidd later filed a civil rights action against former Attorney General Ashcroft, alleging that he and other material witnesses were detained because the government suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime and that there was no intention to call al-Kidd as a witness. The lower

Davis v. United States . . . emphasized that the sole purpose of the exclusionary rule was to deter future Fourth Amendment violations.

8. *Id.* at 1864 (Ginsburg, J., dissenting).

9. *Id.* at 1865-66.

10. 131 S.Ct. 2419 (2011).

11. 453 U.S. 454 (1981).

12. 556 U.S. 332 (2009).

13. *Davis*, 131 S.Ct. at 2427 (citations omitted).

14. *Id.* at 2428 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)).

15. *Id.* at 2429.

16. 479 U.S. 314 (1987).

17. *Davis*, 131 S.Ct. at 2436 (Breyer, J., dissenting).

18. *Id.* at 2439.

19. *Id.* (citations omitted).

20. Professor Orin Kerr, who represented Davis, made a number of these points in an article he wrote before his work on the *Davis* case. See Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011).

21. 131 S.Ct. 2074 (2011).

The Court held that the age of a minor subjected to police questioning is relevant to the Miranda custody analysis.

federal courts denied Ashcroft's motion to dismiss based on absolute and qualified immunity. The Supreme Court reversed. Although the case is a civil rights action and not a criminal appeal, it contains an important Fourth Amendment holding.

The Court held both that the complaint failed to allege a Fourth Amendment violation

and that Ashcroft did not violate clearly established law. The opinion for the Court, written by Justice Scalia (and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito), addresses the allegation that the use of the material witness warrant was pretextual. The majority noted that the Fourth Amendment reasonableness inquiry is predominantly objective. Courts ask whether the circumstances, viewed objectively, justify the government's actions. "If so, that action was reasonable 'whatever the subjective intent' motivating the relevant officials."²² There are limited exceptions where actual motivations do matter—such as special-needs and administrative-search cases—but neither category was relevant here. Nor could al-Kidd rely on checkpoint or other suspicionless stop cases because here there was a warrant issued by a judge based on individualized suspicion. The majority also rejected al-Kidd's claim that *Whren v. United States*²³ established that one may ignore subjective intent *only* where there is probable cause to believe that a violation of law has occurred. The Court concluded that "an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive."²⁴

Justice Kennedy pointed out in a concurring opinion some of the challenges faced by a national officeholder when faced with inconsistent legal rules in different jurisdictions and argued that a national officeholder should be given some deference for qualified-immunity purposes. Justice Ginsburg (joined by Justices Breyer and Sotomayor) agreed that there was no clearly established law that rendered Ashcroft answerable in damages. But they also questioned whether there was a validly obtained material witness warrant, pointing to some omissions from the affidavit supporting the warrant.

Finally, the justices heard argument in another Fourth Amendment case, *Tolentino v. New York*,²⁵ that raised the question of whether preexisting identity-related governmental documents (such as motor vehicle records) are subject to the exclusionary rule when they are obtained as the direct result of

police action that violates the Fourth Amendment. But the Court dismissed the writ of certiorari as improvidently granted.²⁶

FIFTH AMENDMENT

The 2009-2010 Term gave us three *Miranda* blockbusters, including *Florida v. Powell*,²⁷ *Maryland v. Shatzer*,²⁸ and especially *Berghuis v. Thompson*.²⁹ There was only one *Miranda* case in the 2010-2011 Term, *J.D.B. v. North Carolina*,³⁰ but it was important. The Court held that the age of a minor subjected to police questioning is relevant to the *Miranda* custody analysis.

J.D.B. was a 13-year-old student in the seventh grade. North Carolina officers suspected him of participating in several home break-ins. A uniformed police officer pulled him from his classroom and escorted him to a closed-door conference room at the school. There he was questioned by two officers with two school administrators present. Before questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak with his grandmother (who was his legal guardian). J.D.B. initially denied any wrongdoing. After being confronted with a stolen camera and told by a school administrator to "do the right thing," he asked if he would still be in trouble if he returned the stolen items. The investigating officer warned that he might need to seek an order sending J.D.B. to juvenile detention if the officer believed he would continue to break into other homes. J.D.B. confessed. He was subsequently given *Miranda* warnings and acknowledged understanding them.³¹ J.D.B. then gave additional information including the location of the stolen items. In juvenile court, J.D.B.'s suppression motions were denied, and he was adjudicated delinquent. The North Carolina Court of Appeals affirmed. The U.S. Supreme Court reversed in a 5-4 decision.

Writing for the majority, Justice Sotomayor first noted the compelling pressures inherent in a custodial interrogation. Whether a suspect is in custody is an objective inquiry that encompasses two discrete inquiries, including the circumstances surrounding the interrogation and whether, given those circumstances, a reasonable person would feel free to terminate the interrogation and leave. Although the inquiry is objective in nature, the majority rejected the State's argument that a child's age has no place in the custody analysis. The majority noted that a reasonable child subjected to police questioning sometimes will feel pressured to submit even when a reasonable adult would not, and "courts can account for that reality without doing any damage to the objective nature of the custody analysis."³² Distinguishing *Yarborough v. Alvarado*,³³ where the justices held that a state court's exclusion of age from the custody determination was not objectively unreasonable under the

22. *Id.* at 2080 (quoting *Whren v. United States*, 517 U.S. 806, 814 (1996)).

23. 517 U.S. 806 (1996).

24. *Al-Kidd*, 131 S.Ct. at 2085.

25. 131 S.Ct. 1387 (2011).

26. *Id.*

27. 130 S.Ct. 1195 (2010).

28. 130 S.Ct. 1213 (2010).

29. 130 S.Ct. 2250 (2010).

30. 131 S.Ct. 2394 (2011).

31. It appeared from the trial court's findings that warnings were given only after the initial confession, but the point was not entirely clear, and the state courts may revisit the findings on remand. *Id.* at 2400 n.2.

32. *Id.* at 2403.

33. 541 U.S. 652 (2004).

deferential standards that apply in habeas corpus cases, the majority discussed the variety of legal contexts in which children are treated differently than adults. The Court held that “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”³⁴ While age may not be determinative or even significant in every case, “[i]t is . . . a reality that courts cannot simply ignore.”³⁵

Dissenting, Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, argued that including age in the custody analysis would undermine the bright-line nature of the *Miranda* rule. Until now, the *Miranda* custody determination has been a one-size-fits-all reasonable-person test, but now it must account for at least one individualized characteristic. The dissenting justices argued that there was no need to include this characteristic in the custody inquiry for at least three reasons. First, because many juveniles questioned by police are near the age of majority, a one-size-fits-all rule may not be a bad fit. Second, accounting for the circumstances of the interrogation (such as questioning at a school, as in this case) may address many of the same issues without focusing on an individual characteristic of the suspect. Third, age always can be considered as part of a voluntariness analysis. In addition, the dissenters were concerned that the ruling opens the door to considerations of other personal characteristics. For example, age may not be different from intelligence, cultural background, education, or other factors and, “[i]n time, the Court will have to confront these issues.”³⁶ It then will have to decide whether age is different or “it may choose to extend today’s holding and, in doing so, further undermine the very rationale for the *Miranda* regime.”³⁷

The decision in *J.D.B.* is quite intriguing for *Miranda* aficionados. Some may have thought that though it was a habeas decision, *Alvarado* foreshadowed a different result. And the ruling appears counter to the somewhat rote way in which the justices have tended to assess compliance with *Miranda*—such as by permitting flexibility in the language of the warnings, under the assumption that suspects can understand virtually any admonitions that cover the legal basics (as in last Term’s *Powell* decision), and by accepting an admission as an implied *Miranda* waiver, even when that admission comes after several hours of interrogation (as in *Thompkins*). In light of the decisions from previous terms, and given the protections that the Court has afforded to minors in other contexts, it may be difficult to see *J.D.B.* as signaling a fundamental shift in the Court’s approach to *Miranda*. On the other hand, the dissenters were surely correct that defendants will argue that other indi-

vidual characteristics of suspects should be treated no differently than age. It will be interesting to see how courts address these and other arguments going forward.³⁸

SIXTH AMENDMENT

The Term produced two more opinions that mine the *Crawford v. Washington*³⁹ and *Davis v. Washington*⁴⁰ mother-

lode. In *Michigan v. Bryant*,⁴¹ the justices considered whether admission of a dying declaration violates the Confrontation Clause. Responding to a radio report, Detroit officers found the dying victim in a parking lot, shot. They asked him about the shooting. The victim identified the defendant and provided some details. The case was tried before *Crawford*, and the statements were admitted. The Michigan Supreme Court vacated the conviction, finding a violation of the Confrontation Clause. In a 6-2 ruling (with Justice Kagan not participating), the Supreme Court reversed.

Justice Sotomayor wrote for the Court. In *Davis*, the justices held that a statement made during police questioning may be non-testimonial if the circumstances objectively indicated that the primary purpose of the interrogation was to meet an ongoing emergency. *Bryant* provided the Court the first opportunity to apply this test outside of the domestic violence context with a victim who was found in a public location and a perpetrator whose location was unknown when the officers found the victim. A conversation that begins in an effort to determine the need for emergency assistance, and which is non-testimonial, may evolve into testimonial statements, the majority noted. The trial courts can determine when or if that transition occurs. To assess the primary purpose of the interrogation, courts may look at the parties’ perception that an emergency is ongoing and the type of dispute involved. Here the justices could not say “that a person in [the victim’s] situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution.’”⁴² Nothing in the decedent’s responses indicated to the police that there was no emergency or the prior emergency had ended. Further, the situation in the questioning was informal, more like a harried 911 call than a structured stationhouse interrogation. Under these circumstances, the decedent’s statements were not testimonial and their admission did not violate the Confrontation Clause.⁴³ Justice Thomas concurred in the judg-

A conversation that begins in an effort to determine the need for emergency assistance . . . may evolve into testimonial statements.

34. *J.D.B.*, 131 S.Ct. at 2406.

35. *Id.*

36. *Id.* at 2415 (Alito, J., dissenting).

37. *Id.*

38. There are already a few decisions that have applied *J.D.B.* in other contexts. The Ohio Court of Appeals relied upon *J.D.B.* in construing the mens rea for assault, finding that there was insufficient evidence that the juvenile knew that his conduct probably would cause a particular result. See *In re S.C.W.*, 2011 Ohio 3193, 2011 WL 2565623 (Ct. App. 2011). The Illinois Appellate Court has

cited *J.D.B.* in support of the proposition that age is relevant in determining the voluntariness of a statement. See *In re P.C.D.*, No. 5-08-0659, 2011 Ill. App. LEXIS 1663 (July 8, 2011) (finding statement voluntary).

39. 541 U.S. 36 (2004).

40. 547 U.S. 813 (2006).

41. 131 S.Ct. 1143 (2011).

42. *Id.* at 1165 (quoting *Davis*, 547 U.S. at 822).

43. *Id.* at 1166-67.

[T]he analyst who was called at trial was not an adequate substitute for the analyst who conducted the test and wrote the report.

transparently false that professing to believe it demeans this institution.”⁴⁴ From the victim’s perspective, his statements had little value except to ensure the arrest and later prosecution of the defendant. And, according to Justice Scalia, none of the officers’ actions indicated that they perceived an imminent threat. Thus, “[t]he Court’s distorted view creates an expansive exception to the Confrontation Clause for violent crimes.”⁴⁵ Further, he argued, the majority’s highly contextualized balancing test is “no better than the nine-factor balancing test we rejected in *Crawford*.”⁴⁶ Justice Ginsburg also dissented, though she did not join Justice Scalia’s opinion. She underscored the concern that the majority has created an expansive exception to the Confrontation Clause for violent crimes.

The other case, *Bullcoming v. New Mexico*,⁴⁷ was a sequel to *Melendez-Diaz v. Massachusetts*,⁴⁸ in which the Court found that a laboratory report identifying a substance as cocaine was testimonial within the meaning of the Confrontation Clause. *Bullcoming* involved a forensic laboratory report certifying that the defendant’s blood-alcohol concentration was above the level required for an aggravated DWI offense. At trial, the State did not call the analyst who performed the test and signed the certification. Rather, prosecutors called a different scientist from the laboratory. The report was admitted into evidence as a business record. The New Mexico Supreme Court found that the report was testimonial but that its admission did not violate the Confrontation Clause. The Supreme Court reversed in a 5-4 opinion written by Justice Ginsburg.

The Court agreed that the report was testimonial. Unlike the state supreme court, however, the justices determined that the analyst who was called at trial was not an adequate substitute for the analyst who conducted the test and wrote the report. Surrogate testimony could not “expose any lapses or lies on the certifying analyst’s part.”⁴⁹ Nor does the Confrontation Clause itself suggest that open-ended exceptions from the confrontation requirement may be developed by the courts. In a part of her opinion joined only by Justice Scalia, Justice Ginsburg also wrote that the application of the Confrontation Clause here would not be an undue burden on

ment because the questioning by police lacked sufficient formality and solemnity for the statements to be “testimonial” in light of historical practices.

Justice Scalia dissented, using harsh language (even for him). He wrote that “[t]oday’s tale” of officers conducting examinations of a dying man with the primary purpose to protect him and others from a murderer on the loose “is so

the prosecution, and she rejected a claim that the defense always could retest the sample if it had any concerns about it. Justice Sotomayor concurred, largely to highlight some aspects about how this case fit within the test set forth earlier in the Term in *Bryant*.

Justice Kennedy wrote the dissent, which was joined by the Chief Justice, Justice Breyer, and Justice Alito. They argued that whether one agrees with the reasoning and result in *Melendez-Diaz*, the majority’s decision was a new and serious misstep. According to the dissenting justices, the certifying analyst’s role was no greater than that of anyone else in the chain of custody of the blood sample. They described the mundane task of processing samples and determining blood-alcohol content. In their view, “requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality.”⁵⁰

EIGHTH AMENDMENT AND CAPITAL PUNISHMENT

The Term’s Eighth Amendment blockbuster was *Brown v. Plata*,⁵¹ which upheld a remedial order to reduce prison overcrowding. Because the most significant parts of *Plata* relate to the remedy, as opposed to the underlying violation of the Eighth Amendment’s Cruel and Unusual Punishments Clause, I discuss the case in the Civil Rights part of this article below. In addition to *Plata*, one other Eighth Amendment case, *Bobby v. Mitts*,⁵² is worth noting. In *Mitts*, the Court granted the State’s petition for writ of certiorari and summarily reversed the court of appeals’ grant of sentencing relief to a capital defendant.

The jury that sentenced Mitts to death had been instructed to determine beyond a reasonable doubt whether the aggravating circumstances were sufficient to outweigh the mitigating factors. Further, if the jury made such a finding, it was required to recommend a sentence of death. But if the jury found that the State failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, the jury then would determine which of two possible life sentences to recommend. The court of appeals found that the instructions were contrary to *Beck v. Alabama*,⁵³ which held that the death penalty may not be imposed when the jury was not allowed to consider a verdict for a lesser included non-capital offense and where the evidence may have supported such a verdict. In its per curiam decision, the Court made clear that the rule in *Beck* is limited to instructions at the guilt phase. “The concern addressed in *Beck* was ‘the risk of an unwarranted conviction’ created when the jury is forced to choose between finding the defendant guilty of a capital offense and declaring him innocent of any wrongdoing.”⁵⁴ The jurors already had convicted Mitts on two counts of aggravated murder and two counts of attempted murder. They were instructed that if they did not find the aggravating circumstances out-

44. *Id.* at 1168 (Scalia, J., dissenting).

45. *Id.* at 1173.

46. *Id.* at 1176.

47. 131 S.Ct. 2705 (2011).

48. 129 S.Ct. 2527 (2009).

49. *Bullcoming*, 131 S.Ct. at 2715.

50. *Id.* at 2724 (Kennedy, J., dissenting).

51. 131 S.Ct. 1910 (2011).

52. 131 S.Ct. 1762 (2011) (per curiam).

53. 447 U.S. 625 (1980).

54. *Mitts*, 131 S.Ct. at 1764 (quoting *Beck*, 447 U.S. at 637).

weighed the mitigating factors, they would choose from two life-sentence options. “There is accordingly no reason to believe that the jurors in this case, unlike the jurors in *Beck*, could have been improperly influenced by a fear that a decision short of death would have resulted in Mitts walking free.”⁵⁵

TENTH AMENDMENT

The Supreme Court does not decide a whole lot of criminal law cases with Tenth Amendment issues. *Bond v. United States*⁵⁶ is worth a look-see.

The defendant in *Bond* was convicted of violating 18 U.S.C. § 229, a federal statute that prohibits the possession or use of a chemical that can cause death, incapacitation, or permanent harm to humans or animals, where not intended for a “peaceful purpose.” *Bond* contended that Congress had no authority to enact the statute, arguing that under the Tenth Amendment the power to criminalize this conduct was reserved to the States. The court of appeals found that *Bonds* lacked standing to raise this claim. The Supreme Court reversed in a unanimous opinion authored by Justice Kennedy.

The Court first concluded that *Bond* had standing for purposes of Article III’s case-or-controversy requirement. She was challenging her conviction and sentence, her incarceration was a concrete injury caused by the conviction, and it would be redressable by invalidating the statute and the conviction. The Court then decided that her challenge should not be disallowed under the prudential rule that parties generally must assert their own legal rights and interests, not rest their claims for relief on the legal rights or interests of third parties. The justices rejected the argument that *Bond* merely was seeking to assert an interest of the State. Rather, she sought to vindicate her own constitutional interests. “It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another.”⁵⁷ But it does more. “Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.”⁵⁸ It is appropriate for an individual to “challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State’s constitutional interests,” even if the State’s interests are also implicated.⁵⁹ Justices Ginsburg and Breyer concurred but observed that a court could not decline to consider *Bond*’s constitutional argument on prudential grounds. The defendant has a personal right not to be convicted under a constitutionally invalid law.

FOURTEENTH AMENDMENT—DUE PROCESS

The Term also produced interesting due process cases involving civil contempt and parole.

Turner v. Rogers,⁶⁰ the civil contempt case, raised the question of whether an individual imprisoned for civil contempt is

entitled to a lawyer or other protections. The petitioner, *Turner*, repeatedly failed to pay child support and was held in contempt on five occasions. After completing a six-month sentence, he received a new order to show cause why he was not in contempt because he was still in arrears. There was a brief hearing in which *Turner* was not represented by counsel. The clerk told *Turner* that he was behind in his payments, and the judge asked him if he wanted to say anything. After a statement by *Turner*, the judge found him in contempt and sentenced him to 12 months in detention. While *Turner* could purge the contempt by paying all of the amount owed, the trial court made no findings as to whether *Turner* had an ability to pay. *Turner* appealed, arguing that he was deprived of his right to counsel under the Due Process Clause. The Court vacated the finding of contempt, though on different grounds than *Turner* had raised.

Writing for the majority, Justice Breyer explained that because this was civil rather than criminal contempt, *Turner* had no right to counsel under the Sixth Amendment. The Court also declined to find a right to counsel under the Due Process Clause in civil-contempt proceedings, even when an indigent person is ordered confined to custody. Applying the *Mathews v. Eldridge*⁶¹ balancing test, the justices decided that although the interest at stake was important, there were other opposing considerations, and there were substitute procedural safeguards that could help protect the individual’s interests. The opposing considerations include that the other party is often the other parent, who also may be unrepresented by counsel. Providing an attorney to the non-paying parent “could create an asymmetry of representation” that would significantly alter the proceeding.⁶² Moreover, a set of substitute procedural safeguards can significantly reduce the risk of erroneous deprivation of liberty. They include providing notice to the defendant that ability to pay is a critical issue in the proceeding, using a form or other procedure to elicit financial information, and providing an opportunity for the defendant to respond to statements about his financial status. The majority concluded that because *Turner* received neither counsel nor the benefit of alternative procedures, his incarceration violated the Due Process Clause.

Justice Thomas dissented. Joined by Justices Scalia, Alito, and Chief Justice Roberts, he argued that neither the Sixth Amendment nor the Due Process Clause provided a right to counsel. If the Due Process Clause created a right to appointed counsel in all proceedings in which detention was ordered, the right under the Sixth Amendment would be superfluous. In a part of the dissent joined only by Justice Scalia, Justice Thomas

Turner v. Rogers
... raised the question of whether an individual imprisoned for civil contempt is entitled to a lawyer.

55. *Id.* at 1765.

56. 131 S.Ct. 2355 (2011).

57. *Id.* at 2364.

58. *Id.*

59. *Id.* at 2365.

60. 131 S.Ct. 2507 (2011).

61. 424 U.S. 319 (1976).

62. *Turner*, 131 S.Ct. at 2519.

[A] court should not be required to ignore positive facts about a defendant just because those facts arose after the initial sentencing.

also contended that there was no basis for concluding that due process secured a right to counsel in this circumstance under an original understanding of the Constitution. And, he argued, the majority's analytical framework did not fully account for the interests that children and mothers have in effective and flexible methods to secure payment.

In *Swarthout v. Cooke*,⁶³ two state prisoners with life sentences in California filed federal habeas corpus petitions to challenge decisions denying their release on parole. Under California law, the State's parole authority—the Board of Prison Terms—“shall” set a release date for a life-sentenced inmate “unless” the Board determines that a lengthier time in custody is required for public safety reasons. The California Supreme Court has held that when an inmate seeks judicial review of a parole denial, the standard of review is whether “some evidence” supports the Board's decision. Applying *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*⁶⁴ and *Board of Pardons v. Allen*,⁶⁵ the federal court of appeals found that the statutory “shall/unless” language creates a liberty interest protected by the Due Process Clause and that a federal court may examine whether “some evidence” supports the denial of parole.⁶⁶ The Supreme Court disagreed and summarily reversed in a per curiam decision.

The Court held that the “some evidence” rule is not a component of the constitutionally protected liberty interest. Rather, “[w]hen . . . a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal.”⁶⁷ In *Greenholtz*, the Court previously found that a prisoner seeking parole “received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied.”⁶⁸ No more is required here. The two inmates were allowed to speak at their hearings and to contest the evidence against them, they were given access to records in advance, and they were notified as to the reasons why parole was denied.⁶⁹

FEDERAL CRIMINAL LAW

Most of the Term's federal criminal law cases are likely to interest only those involved in federal criminal prosecutions.

But two cases relating to rehabilitation, *Pepper v. United States*⁷⁰ and *Tapia v. United States*,⁷¹ may have broader appeal. They contain fascinating discussions about sentencing traditions and reveal some sharp disagreements among the justices.

The defendant in *Pepper* was sentenced several times for a federal drug offense. The court of appeals determined that the district court could not take into account post-sentence rehabilitation in resentencing an offender. The Supreme Court reversed in an opinion by Justice Sotomayor.

The Court began by enunciating the “federal judicial tradition” that sentencing judges consider defendants as individuals. Pointing to *Williams v. New York*,⁷² the majority observed that both before and after the colonies became a nation, “courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used” to determine the kind and extent of punishment.⁷³ Further, “[p]ermitting sentencing courts to consider the widest possible breadth of information about a defendant ‘ensures that the punishment will suit not merely the offense but the individual defendant.’”⁷⁴ The Court interpreted a federal statute, 18 U.S.C. § 3661, as consistent with that tradition and held that a court should not be required to ignore positive facts about a defendant just because those facts arose after the initial sentencing. The majority also rejected a claim that a policy statement issued by the Sentencing Commission should lead to a different result, especially “where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.”⁷⁵ Justice Breyer, who had served as a member of the U.S. Sentencing Commission, concurred but did not find the majority's reference to *Williams* and a sentencing “tradition” helpful. He pointed out that a primary purpose of the guidelines was to bring about greater uniformity in sentencing.

Justice Alito dissented, contending that district court judges are required to give significant weight to the Commission's policy determinations. And, he wrote, “[a]nyone familiar with the history of criminal sentencing in this country cannot fail to see the irony in the Court's praise for the sentencing scheme exemplified by *Williams*” and the statute.⁷⁶ That scheme had fallen into disrepute by the time Congress sought to revamp federal sentencing in 1984. Some language in the Court's opinion “reads like a paean to that old regime,” and Justice Alito expressed his fear that the opinion could be interpreted as approving a move back toward that system.⁷⁷

The defendant in *Tapia* was sentenced to 51 months for alien smuggling. At sentencing, the judge indicated that the defendant should serve a prison term long enough to allow her

63. 131 S.Ct. 859 (2011) (per curiam).

64. 442 U.S. 1 (1979).

65. 482 U.S. 369 (1987).

66. *Swarthout*, 131 S.Ct. at 860-61.

67. *Id.* at 862.

68. *Id.*

69. *Id.*

70. 131 S.Ct. 1229 (2011).

71. 131 S.Ct. 2382 (2011).

72. 337 U.S. 241 (1949).

73. *Pepper*, 131 S.Ct. at 1240 (quoting *Williams*, 337 U.S. at 246).

74. *Id.* (quoting *Wasman v. United States*, 468 U.S. 559, 564 (1984)).

75. *Id.* at 1247.

76. *Id.* at 1256 (Alito, J., concurring in part and dissenting in part).

77. *Id.* at 1257. Justice Thomas also dissented, arguing that the guidelines should be applied as written unless they actually violate the Sixth Amendment. Justice Kagan took no part in the case.

to qualify for and complete a 500-hour residential drug abuse program operated by the Federal Bureau of Prisons. The question on appeal was whether federal sentencing statutes allow a sentencing judge to impose or lengthen a prison term in order to foster the defendant's rehabilitation. In a unanimous opinion written by Justice Kagan, the Court said no. *Tapia*—like *Pepper*—is a primer on the move from a federal indeterminate sentencing regime, in which rehabilitated offenders might be released on parole, to the current system of guidelines and determinate sentences. Under the federal sentencing statutes, the Court held, a sentencing court may consider rehabilitation in determining whether a sanction other than imprisonment is appropriate, but the statutes leave no room to consider rehabilitation in setting the length of a custodial sentence. Justices Sotomayor and Alito agreed with the Court's conclusion but concurred to express their skepticism that the district court judge in this case actually had lengthened *Tapia*'s sentence to promote rehabilitation. But because the record was not entirely clear, these justices joined in the Court's order and remanded the case.

FEDERAL HABEAS CORPUS

As in many years, the Court had a substantial docket of habeas corpus cases. But this Term's decisions seem enormously significant with respect to the deference afforded state courts under the Antiterrorism and Effective Death Penalty Act (AEDPA). Two opinions, *Harrington v. Richter*⁷⁸ and *Cullen v. Pinholster*,⁷⁹ may well become landmarks. For federal habeas corpus review of state court convictions, this may prove to be a watershed Term.

Harrington v. Richter contains two important holdings. Richter was convicted of murder in a California prosecution. The prosecution argued that the decedent was killed as he lay on a couch. Richter's theory was that the shooting was in self-defense and that the decedent was killed in a crossfire as he stood in a doorway. There was a pool of blood in the doorway, but it was never tested to determine its source, and another person was wounded at the scene of the shooting. After Richter's conviction was affirmed on direct appeal, he filed a petition for a writ of habeas corpus in the California Supreme Court with affidavits from forensic experts to support his theory that the decedent was shot in the doorway and the blood came from him. The California Supreme Court denied the petition in a one-sentence summary order. The district court denied Richter's federal habeas corpus petition, but the court of appeals found that he was entitled to relief. In an 8-0 decision written by Justice Kennedy, the Supreme Court reversed.

First, the Court ruled that the state court's summary denial was an adjudication that is due deference under AEDPA. Pursuant to 28 U.S.C. § 2254(d), federal habeas corpus relief cannot be granted with respect to a claim adjudicated on the

merits in state court unless the decision was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts. The justices held that determining whether a state court's decision was the result of an unreasonable legal or factual conclusion does not require an opinion from the state court explaining its reasoning. Richter also argued that the California Supreme Court decision did not indicate that it was on the merits. The Court ruled that when a federal claim has been presented to a state court and relief is denied, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary,"⁸⁰ and Richter did not make a sufficient showing to overcome that presumption. The state courts or legislature are of course free to alter state practice or elaborate more fully on the meaning of a summary denial.

Second, the Court held that the California Supreme Court's decision was not unreasonable. The justices emphasized that "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."⁸¹ While "§ 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," if the AEDPA standard "is difficult to meet, that is because it was meant to be."⁸² Under the "doubly" deferential standards of *Strickland v. Washington*⁸³ and AEDPA, there was a reasonable justification for the state court's decision. Justice Ginsburg concurred. She thought that trial counsel's performance was unreasonable under *Strickland* but that the affidavits did not establish prejudice. Justice Kagan took no part in the case.

Another case decided the same day applied *Richter* to a claim that counsel was ineffective for failing to move to suppress the defendant's confession before recommending a guilty plea. In *Premo v. Moore*,⁸⁴ another 8-0 ruling, Justice Kennedy emphasized that the court of appeals "was wrong to accord scant deference to counsel's judgment, and doubly wrong to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes."⁸⁵ The court of appeals erred in finding the state court's decision to be contrary to *Arizona v. Fulminante*,⁸⁶ since *Fulminante* was a case involving the admission of an involuntary confession and not the *Strickland* standard of effective-

For federal habeas corpus review of state court convictions, this may prove to be a watershed Term.

78. 131 S.Ct. 770 (2011). Disclosure: I co-authored an amicus curiae brief in this case. As with many of my efforts, it was not in support of the side that prevailed.

79. 131 S.Ct. 1388 (2011).

80. *Harrington*, 131 S.Ct. at 784-85.

81. *Id.* at 786.

82. *Id.*

83. 466 U.S. 668 (1984).

84. 131 S.Ct. 733 (2011).

85. *Id.* at 740.

86. 499 U.S. 279 (1991).

“[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”

ness. Justice Ginsburg again concurred, finding an inadequate showing of prejudice; the defendant never said that had he been better informed, he would have turned down the plea offer. Justice Kagan again took no part in the case.

Cullen v. Pinholster is the other potential landmark AEDPA case of the Term with important implications for fact-development procedures

and the duties of counsel in a capital case. Pinholster was convicted of murder, and prosecutors sought the death penalty. Before the penalty phase began, defense counsel moved to exclude aggravating evidence on the grounds that the prosecution did not provide notice of the evidence it sought to introduce. The motion was denied. The prosecution called a series of witnesses, and defense counsel called the defendant's mother but no mental health experts or other witnesses. Pinholster was sentenced to death. His conviction was affirmed by the California Supreme Court, which also summarily denied (without opinion) two habeas corpus petitions. The state petitions alleged, among other things, ineffective assistance of counsel based on the failure to conduct a full penalty phase investigation and failure to present mitigating evidence, including evidence of mental disorders. Although no hearing was held in state court on the habeas petitions, the federal district court conducted an evidentiary hearing. The district court granted relief, and the court of appeals affirmed. The Supreme Court reversed.

Justice Thomas wrote for the Court. One question was whether the federal court had properly reviewed the state court's determinations of law under 28 U.S.C. § 2254(d)(1). That provision provides that a federal court cannot grant relief with respect to a claim due to an error of law unless the adjudication of the claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”⁸⁷ In *Pinholster*, the court of appeals had considered the evidence adduced during the federal evidentiary hearing in deciding that the state court had unreasonably applied *Strickland*. In a part of the opinion that garnered seven votes, the Court found that this was error: “We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”⁸⁸ “Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so.”⁸⁹

In another part of the opinion, five justices found that the

court of appeals erred in concluding that the state court had unreasonably applied clearly established federal law to Pinholster's ineffective-assistance-of-counsel claim. Under *Richter*, the petitioner can satisfy the “unreasonable application” part of § 2254(d)(1) “only by showing that ‘there was no reasonable basis’ for the California Supreme Court's decision.”⁹⁰ Pinholster could not meet this demanding standard. The majority characterized trial counsel's actions as a strategic effort to exclude the prosecution's witnesses for lack of notice and, if that failed, to put on the defendant's mother. But more pointedly, the Court criticized the court of appeals for deriving from prior Supreme Court decisions such as *Williams v. Taylor*,⁹¹ *Wiggins v. Smith*,⁹² and *Rompilla v. Beard*,⁹³ a “constitutional duty to investigate,” saying that this overlooked the wide latitude given to defense counsel in making tactical decisions and that “[b]eyond the general requirement of reasonableness, ‘specific guidelines are not appropriate.’”⁹⁴

Justice Alito concurred in the judgment but disagreed with the majority's construction of § 2254(d)(1), finding that a federal court must take into account the new evidence admitted in a federal evidentiary hearing. Justice Alito also noted, however, that under AEDPA such hearings should be rare.

Justice Sotomayor wrote a lengthy and sharp dissent. Along with Justice Alito, she would have construed § 2254(d)(1) to permit a federal court to consider new evidence presented at an evidentiary hearing. The problem with the majority's approach, she wrote, “is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court.”⁹⁵ As an example, she gave the case of a petitioner who diligently attempted in state court to develop the factual basis of the claim that prosecutors withheld exculpatory evidence. If the petitioner uncovered evidence after the state court denied relief but before filing in federal court, there may be no adequate mechanism for the individual to develop his claim and obtain a ruling on it, especially if state law does not permit successive petitions. In a part of the dissent joined by Justices Ginsburg and Kagan, Justice Sotomayor argued that as *Wiggins*, *Williams* and other cases “make clear, the prevailing professional norms at the time of Pinholster's trial required his attorneys to ‘conduct a thorough investigation of the defendant's background,’ . . . or ‘to make a reasonable decision that makes particular investigations unnecessary.’”⁹⁶ “*Wiggins*,” she wrote, “is illustrative of the competence we have required of counsel in a capital case” and “[t]his case is remarkably similar to *Wiggins*.”⁹⁷

Justice Breyer joined in the majority's construction of § 2254(d)(1) but would have sent the case back to the court of appeals to apply the legal standards to the facts. He also wrote separately to explain the situations in which, in his view, a petitioner might still obtain a federal evidentiary hearing.

In the wake of *Pinholster*, a number of lower federal courts

87. 28 U.S.C. § 2254(d)(1).

88. *Pinholster*, 131 S.Ct. at 1398.

89. *Id.* at 1401.

90. *Id.* at 1402 (quoting *Richter*, 131 S.Ct. at 784).

91. 529 U.S. 362 (2000).

92. 539 U.S. 510 (2003).

93. 545 U.S. 374 (2005).

94. *Pinholster*, 131 S.Ct. at 1406 (quoting *Strickland*, 466 U.S. at 688).

95. *Id.* at 1417 (Sotomayor, J., dissenting).

96. *Id.* at 1427-28 (citations omitted).

97. *Id.* at 1428.

have found that petitioners were not entitled to evidentiary hearings,⁹⁸ though some courts have permitted hearings to go forward in limited circumstances, such as to establish actual innocence or when a state court made no factual findings but unreasonably applied *Strickland* and denied relief based on the petitioner's allegations alone.⁹⁹ It remains to be seen whether courts will view *Pinholster* as a substantial revision of defense counsel's duties with respect to mitigating evidence.

Two other habeas cases are worth noting. In *Walker v. Martin*,¹⁰⁰ the Court gave further guidance about state procedural decisions that may bar later federal habeas corpus review. Martin filed a habeas corpus petition in the California Supreme Court nearly five years after his conviction became final. California requires a prisoner to seek habeas relief without substantial delay. Many petitions are denied summarily without explanation (as in *Richter*), but courts also often cite cases indicating that a petition was dismissed for procedural grounds. While the California Supreme Court had discretion to reach the merits of Martin's petition despite any delay in filing, that court denied his petition with a citation to two cases, indicating that the petition was untimely. In a unanimous decision authored by Justice Ginsburg, the Court found that this was sufficient to foreclose federal review. A discretionary state procedural rule "can serve as an adequate ground to bar federal habeas review" if it is firmly established and regularly followed.¹⁰¹ California's time rule, although discretionary, instructs habeas petitioners to allege with specificity the absence of delay, good cause for it, or eligibility for one of several exceptions to the time bar. The time rule was thus firmly established and not too vague; nor did it impose new and unforeseeable requirements or operate to the particular disadvantage of inmates asserting federal rights.

The other case, *Wall v. Kholi*,¹⁰² resolved an issue that had split the lower federal courts: whether a motion to reduce a state sentence tolls the AEDPA limitations period for filing a federal habeas corpus petition. Under 28 U.S.C. § 2244(d)(2), a petitioner has one year to file a federal petition, though the time period is tolled during the pendency of "a properly filed application for State post-conviction or other collateral review."¹⁰³ The Court in *Kholi* defined "collateral review" as "a form of review that is not part of the direct appeal process."¹⁰⁴

Kholi's motion was filed under a state rule that functionally provides for a plea for leniency apart from the direct review process and thus was seeking "collateral review" under this definition.

CIVIL RIGHTS

The Term's most significant civil rights case was *Brown v. Plata*, which affirmed a three-judge panel's order with respect to medical care and prison overcrowding in California. I also will discuss two other civil rights cases, *Skinner v. Switzer*¹⁰⁵ and *Connick v. Thompson*,¹⁰⁶ they contain important holdings about the availability of civil rights remedies for exonerated defendants and those who merely nurse the hope that they someday may be exonerated.

Two decades-old class-action prison-conditions cases were consolidated in *Plata*. One, *Coleman v. Brown*, involved prisoners with serious mental illnesses. The second, *Plata*, was brought on behalf of inmates with serious medical conditions. After years of litigation, which included the appointment of a special master in *Coleman* and a receiver in *Plata*, the plaintiffs moved to empanel a three-judge court empowered under the Prison Litigation Reform Act (PLRA)¹⁰⁷ to order reductions in the prison population. Following a trial, the three-judge court issued a lengthy opinion with detailed findings of fact and ordered the State to reduce its prison population to 137.5% of the prisons' design capacity within two years, though the order did not require California to achieve this reduction in any particular manner. The State appealed. The Supreme Court affirmed, 5-4.

Writing for the majority, Justice Kennedy rejected the claim that California should have been given more time to implement other remedial measures before ordering a reduction in population. The Court noted how long the federal courts already had sought to remedy the violations. The majority upheld the factual findings by the three-judge court, its determination that "overcrowding was the primary cause in the

A discretionary state procedural rule "can serve as an adequate ground to bar federal habeas review" if it is firmly established and regularly followed.

98. See, e.g., *Jackson v. Kelly*, 650 F.3d 477, 492 (4th Cir. 2011) (citing *Pinholster* and finding that "the [district] court's reliance on material developed at the federal evidentiary hearing was at odds with AEDPA's placement of 'primary responsibility [for habeas review] with the state courts.'"); *Parrish v. Simpson*, 2011 WL 1594789, at *3, 2011 U.S. Dist. LEXIS 45551, at *9 (W.D. Ky. Apr. 27, 2011) (citing *Pinholster* and finding that "it would be futile to allow discovery and to conduct an evidentiary hearing because the Court would not be able to consider anything beyond the state-court record.")

99. See, e.g., *United States ex rel. Brady v. Hardy*, 2011 WL 1575662, at *3, 2011 U.S. Dist. LEXIS 44570, at *8-9 (N.D. Ill. Apr. 25, 2011) (declining to vacate order for evidentiary hearing to determine whether petitioner can overcome a procedural default by showing actual innocence); *Hale v. Davis*, 2011 WL 3163375, at *17-18, 2011 U.S. Dist. LEXIS 82173, at *22, 44-46 (E.D. Mich. July 27, 2011) (finding that hearing was properly held and that

district court could consider the new evidence, as the state court apparently assumed that the petitioner's claims were true and then unreasonably determined that, if they were true, he would not be entitled to relief); see also *Pao Lo v. Kane*, 2011 WL 2462932, at *32, 2011 U.S. Dist. LEXIS 64620, at *84-87 (E.D. Cal. June 17, 2011) (state court unreasonably applied Supreme Court precedent in denying petitioner a complete voir dire transcript so that he could fully raise a *Batson* claim).

100. 131 S.Ct. 1120 (2011).

101. *Id.* at 1128 (quoting *Beard v. Kindler*, 130 S.Ct. 612, 618 (2009)).

102. 131 S.Ct. 1278 (2011). Justice Scalia joined all but a footnote of the Court's opinion.

103. 28 U.S.C. § 2244 (d)(2).

104. *Id.* at 1284.

105. 131 S.Ct. 1289 (2011).

106. 131 S.Ct. 1350 (2011).

107. 18 U.S.C. § 3626.

Justice Scalia . . . alleged that “[t]oday the Court affirms what is perhaps the most radical injunction issued by a court in our Nation’s history.”

sense of being the foremost cause of the violation,” and the finding by clear and convincing evidence that no other relief will remedy the violation of the federal right.¹⁰⁸ The justices concluded that the remedial order was narrowly drawn, extended no further than necessary to correct the violation of federal rights, and there were means of reducing overcrowding that would have little or no

impact on public safety.

The four dissenting justices pulled no punches. Justice Scalia, joined by Justice Thomas, alleged that “[t]oday the Court affirms what is perhaps the most radical injunction issued by a court in our Nation’s history.”¹⁰⁹ That was followed with perhaps an even more remarkable statement: “There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa.”¹¹⁰ These justices disagreed with many aspects of the majority’s decision, particularly the issuance of a “structural injunction,” arguing that the decision “vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations.”¹¹¹ In a separate dissent, Justice Alito, joined by Chief Justice Roberts, contended that this case was a perfect example of what the PLRA was supposed to prevent. They took issue with the three-judge court’s factual findings, called the order to release inmates a “radical and dangerous step,” and accused the majority of “gambling with the safety of the people of California.”¹¹²

The other two civil rights decisions are important, though they contain fewer fireworks. *Skinner* is the “hope to be exonerated” case. It presents a question left unresolved two years ago in *District Attorney’s Office for Third Judicial District v. Osborne*¹¹³ of whether a state prisoner seeking DNA testing of crime-scene evidence may raise that claim in a civil rights action under 42 U.S.C. § 1983. Skinner was convicted of several counts of murder and sentenced to death in Texas. He admitted that he was present in the house when the killings took place but argued that he was too incapacitated to have committed the murders, and he identified another person as the likely perpetrator. The State tested some evidence found at the crime scene, but other evidence (including the murder weapon) was untested. Texas has enacted a statute to allow prisoners to gain post-conviction DNA testing in certain circumstances. Skinner twice moved in state court for the yet untested biological evidence, but his motions were denied. He subsequently filed a federal civil rights action seeking access to the biological evidence. The lower courts dismissed his suit,

finding that an action seeking DNA testing is not cognizable under § 1983 but instead must be brought as a petition for writ of habeas corpus. In a 6-3 decision written by Justice Ginsburg, the Court reversed.

The majority first observed that the question was not whether Skinner ultimately would win but rather whether his complaint was cognizable under the federal civil rights statute. The gist of his legal claim was that the Texas post-conviction DNA statute, as construed by the Texas courts, denied him due process because it would appear to foreclose new testing for any prisoner who could have sought DNA testing before trial but did not. The Court noted the basic test that a claim should be raised on habeas corpus if a favorable judgment would necessarily imply the invalidity of the conviction or sentence. In this case, success in Skinner’s suit for DNA testing “would not ‘necessarily imply’ the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; . . . results might prove inconclusive or they might further incriminate Skinner.”¹¹⁴ As such, the case was properly filed as a civil rights action. The majority also turned aside arguments that such a ruling would lead to a proliferation of federal civil rights actions seeking post-conviction discovery of evidence.

Justice Thomas, joined by Justices Kennedy and Alito, dissented. He contended that “[c]hallenges to all state procedures for reviewing the validity of a conviction should be treated the same as challenges to state trial procedures, which we have already recognized may not be brought under § 1983.”¹¹⁵ The dissenters particularly feared that the decision would spill over to claims under *Brady v. Maryland*,¹¹⁶ and they argued that “[i]n truth, the majority provides a roadmap for any unsuccessful state habeas petitioner to relitigate his claim under § 1983.”¹¹⁷

If the three dissenting justices in *Skinner* were especially concerned about inmates or exonerated defendants raising *Brady* claims under § 1983, *Connick v. Thompson*—decided just three weeks after *Skinner*—gave these justices a formidable vehicle to assuage at least some of their fears.

The respondent in *Thompson* was convicted in Orleans Parish of two offenses. First, he was convicted of an armed robbery. Then, a few weeks later, he was prosecuted for murder. Because of the armed-robbery conviction, Thompson did not testify at the murder trial. He was convicted and sentenced to death. Years later, just before Thompson was scheduled to be executed, an investigator made a startling discovery of a crime lab report that never had been provided to defense counsel. It turns out that in the robbery case, prosecutors in Orleans Parish did not disclose that they had a swatch of fabric stained with the blood of the robber and that the robber had blood type B. Thompson had blood type O. When this evidence was presented to the district attorney’s office, it moved to stay the execution and vacate the armed-robbery conviction. A state court also reversed the murder conviction (based on the vacatur of

108. *Plata*, 131 S.Ct. at 1936-39.

109. *Id.* at 1950 (Scalia, J., dissenting).

110. *Id.*

111. *Id.* at 1953.

112. *Id.* at 1963, 1967 (Alito, J., dissenting).

113. 129 S.Ct. 2308 (2009).

114. *Skinner*, 131 S.Ct. at 1298.

115. *Id.* at 1302 (Thomas, J., dissenting).

116. 373 U.S. 83 (1963).

117. *Skinner*, 131 S.Ct. at 1303.

the armed-robbery conviction). Thompson was retried for the murder and was acquitted. He then brought a § 1983 action against the district attorney's office, District Attorney Connick, and others alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. It was conceded at trial that a *Brady* violation was committed by one or more of the individual prosecutors involved in the armed-robbery case. The jury, however, found that the district attorney and his office were also liable and awarded Thompson damages. In a 5-4 decision, the Supreme Court reversed the damage award, holding that, on the facts of the case, the district attorney's office could not be liable for failure to train prosecutors about their *Brady* obligations. This time, Justice Thomas' opinion was for the Court.

The majority found that under a failure-to-train theory, Thompson bore the burden of proving both "(1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case."¹¹⁸ Connick prevailed as a matter of law because Thompson did not prove that the district attorney was on actual or constructive notice of a need for more or different *Brady* training, and thus he was not deliberately indifferent to such a need. Although Thompson pointed out that during the 10 years before his armed robbery trial, Louisiana courts overturned four convictions because of *Brady* violations by prosecutors in Orleans Parish, these could not have put the district attorney on notice. "None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind."¹¹⁹ Nor could Thompson win by arguing that the violation in his case was the obvious consequence of failure to provide specific *Brady* training. "In light of [the] regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law."¹²⁰ Justices Scalia and Alito concurred. They emphasized that "failure-to-train" liability is available only in limited circumstances and that a pattern of violations is usually necessary to establish municipal culpability and causation.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. They argued that "the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish," which amounts to persistent, deliberately indifferent conduct for which the district attorney's office bears responsibility under § 1983.¹²¹ The dissenting justices pointed to a number of facts: the prosecutor who suppressed the evidence confessed to a former Orleans Parish prosecutor that he had done so, and the former prosecutor kept the confession to himself for five years; the

prosecution did not disclose 10 other reports or items of evidence when Thompson was first tried; and the district attorney himself and other leaders of the office misunderstood their obligations under *Brady*. Based on the evidence, the dissenters argued, "the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's office."¹²²

**All in all,
2010-2011 was
a significant
though perhaps
not momentous
Term, apart from
the federal
habeas corpus
rulings.**

A LOOK AHEAD

All in all, 2010-2011 was a significant though perhaps not momentous Term, apart from the federal habeas corpus rulings. What will the current year bring? It is still early, but a number of important matters appear headed for decision including Fourth Amendment challenges to the warrantless use of GPS tracking devices¹²³ and to suspicionless strip searches in jails.¹²⁴ The justices are addressing yet another *Brady* violation from the New Orleans District Attorney's Office. [insert fn. *Smith v. Cain*, No. 10-8145]. As *Smith* was argued early in the Term, it is perhaps merely an hors d'oeuvre for the Court. Other more substantial cases ask whether allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts violates the Confrontation Clause,¹²⁵ whether the Double Jeopardy Clause bars reprosecution for a greater offense when a jury deadlocked on a lesser offense announces that it has voted against guilt on the greater offense,¹²⁶ whether a prisoner is always in custody for *Miranda* purposes when he is isolated from general population and questioned,¹²⁷ and whether failures by state post-conviction lawyers can be attributed to a capital defendant and thus bar federal habeas review.¹²⁸ Stay tuned.



Charles D. Weisselberg is the Shannon Cecil Turner Professor of Law at the University of California, Berkeley, where he has taught since 1998. He served at the University of Southern California School of Law from 1987 to 1998 and was previously in public and private practice. Weisselberg was the founding director of Berkeley Law's in-house clinical program. He teaches criminal procedure, criminal law and this, that and the other. Weisselberg received his B.A. from The Johns Hopkins University in 1979 and his J.D. from the University of Chicago in 1982. Professor Weisselberg is grateful to Jessica Ly and Tom Rickeman for their research assistance.

118. *Thompson*, 131 S.Ct. at 1358.

119. *Id.* at 1360.

120. *Id.* at 1363 (citation omitted).

121. *Id.* at 1370 (Ginsburg, J., dissenting).

122. *Id.* at 1384.

123. *United States v. Jones*, No. 10-1259.

124. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, No. 10-945.

125. *Williams v. Illinois*, No. 10-8505.

126. *Blueford v. Arkansas*, No. 10-1320.

127. *Howes v. Fields*, No. 10-680.

128. *Maples v. Thomas*, No. 10-63.

Lawyer-Assistance-Program Attorneys and the Practice of Therapeutic Jurisprudence

David B. Wexler

In my recent book, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice*,¹ I sought to provide lawyers and other professionals engaged in the practice of criminal law a collection of practical and comprehensive materials that could help them achieve better results as well as greater satisfaction with their clients and cases. At least one of the contributors to the book also had some connection to a lawyer-assistance program—a program that helps lawyers having problems with drugs, alcohol, and mental illness. Such lawyers are now helped immensely by such programs in all states,² and the lawyers in turn have much insight and experience to offer their clients and other professionals. Lawyer-assistance programs rely heavily on lawyer volunteers, themselves in recovery from a variety of impairing conditions. Many begin their recovery due to some bar disciplinary action, while others find help and assistance through lawyer-assistance programs voluntarily. Those who have received help often willingly “give back” by lending support to other impaired lawyers.³

These lawyers, especially those subject to law-license disciplinary proceedings, are themselves the “recipients” of a therapeutic jurisprudence (TJ) legal approach. Indeed, Dallas lawyer John McShane restricts his practice to TJ, and one important area of his work is the representation of professionals in license disciplinary matters.⁴ Other components of his practice include collaborative divorce and a criminal-defense practice limited to TJ matters, where he is involved not in trial

work but only in the stages of plea bargaining and sentencing.⁵

An important section of the *Rehabilitating Lawyers* book is devoted to portraying the work of TJ criminal lawyers. One such case shows the successful result of an Ottawa law firm (attorney Michael Crystal and director of therapeutic solutions Karine Langley) working with a defendant’s mother in canvassing the neighborhood and producing an affidavit, with attached neighbor letters, supportive of a non-incarcerative community sentence. The neighbor letters asserted that they would not fear for their safety if the defendant were to live with his mother, and that they would be willing to report him if he were in violation of imposed probation conditions.⁶ Another essay details how another Canadian lawyer, David Boulding, an expert in fetal-alcohol spectrum disorder, works with affected young adult defendants in urging non-incarcerative penalties and in proposing, with the help of a family and community support system, truly workable conditions of probation.⁷ The final case, to be discussed in greater detail here, is a “jailhouse intervention” conducted by John McShane.⁸

The thrust of this so-called intervention was for McShane, at the behest of a family, to visit a jail inmate charged with arson and to try to arrange a conditional bond so that the inmate could be released to drug and mental-health treatment. The family had retained a well-known defense lawyer, and they then added McShane to the defense team because of his reputation as a therapeutic-jurisprudence criminal lawyer. In McShane’s words, “My job was to intervene with the defen-

The author expresses his thanks for helpful comments to Don Carroll, Robert Ward, and Michael Perlin.

Footnotes

1. REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler ed., 2008)
2. On a national level, the American Bar Association’s Commission on Lawyers Assistance Programs acts as a clearinghouse and resource center. Known as CoLAP, its website can be found at http://www.americanbar.org/lawyer_assistance.html (last visited Oct. 20, 2011).
3. As an example, for a discussion of the North Carolina lawyer-assistance program, and a description of their lawyer volunteers, lawyers known as PALS (those working with addiction) and FRIENDS (those working with depression and mental health), see the Symposium on the Lawyer Assistance Program in the Fall 2010 issue of the *North Carolina State Bar Journal*, available at http://www.ncbar.gov/journal/archive/journal_15.3.pdf (last visited Oct. 20, 2011). See also Michael L. Perlin, “Baby, Look Inside Your Mirror”: The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities, 69 U. PITT. L. REV. 589 (2008),

available at <http://ssrn.com/abstract=1111596> (last visited Oct. 20, 2011). For a discussion of the stresses of the legal profession and its impact on lawyer well-being, see Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 555-557 (1998). For a discussion of the psychological impact of the adversary system and our “argument culture”—and of the potentially “palliative” role of therapeutic jurisprudence—see David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).

4. REHABILITATING LAWYERS, *supra* note 1, at 193.
5. For an explanation of McShane’s approach to criminal law practice, see *id.* at 21, 193-206.
6. *Id.* at 185-186.
7. *Id.* at 186-193. The family and community support system, sometimes referred to as the “external brain,” is discussed in the book at pp. 191-192.
8. *Id.* at 193-206.

dant, convince him to go to treatment, and then persuade the judge at the bond hearing to release him on a conditional bond so he could attend treatment.”⁹

McShane’s essay in *Rehabilitating Lawyers*, which contains copies of his briefs introducing the court to TJ and to McShane’s role as a TJ lawyer, makes for spellbinding reading.¹⁰ He recounts his several interviews with the jailed defendant, culminating in the defendant agreeing to accept McShane as his lawyer.¹¹ And, what’s more, the story has a happy ending: success in treatment, a lenient plea-bargain agreement, a successfully served probationary period, and, as of the time McShane wrote, a clean and sober citizen, reunited with his family, holding a good job, and serving as an upright citizen.

But this case was trickier than it at first appears. For example, McShane was initially retained by the family to attempt an intervention with their jailed relative. The defendant himself was indigent, so any bond would have had to be paid by the family. But as a condition of undertaking the intervention, and because he had the luxury of being in private practice, which left him free to take or leave cases as he saw fit, McShane insisted the family pay only a “going to treatment” bond and not a “getting back on the street” bond.¹²

Later, when McShane saw the defendant at the family’s request, McShane discussed the agonies of addiction and depression, and he suggested that treatment might offer another way to live. Eventually, McShane offered to represent the defendant in an effort to be released from jail and to be transferred to a treatment center. Again, McShane imposed a condition on the representation, one that the client ultimately accepted: his family would only post this bond and stay committed to it if he remained in the treatment center; leaving the treatment center against medical advice or being expelled from it would result in revocation of the bond and re-arrest.¹³

For our purposes, there is an additional, crucially important aspect of McShane’s representation: McShane is himself a recovering alcoholic who, at the time of writing the brief in this particular jailhouse-intervention case, had been clean and sober for more than 26 years.¹⁴ In his brief, McShane recounts how he tells defendants—including the defendant in the case at hand—“how the attorney’s life was almost destroyed by

alcohol and drugs, the availability of treatment for addiction, and the promise of a rich, full, and joyful life if recovery is embraced.”¹⁵

McShane’s status as a long-term recovering alcoholic adds credibility to his court pleadings and surely adds credibility to his work with addicted clients. His conversations with defendants soften their resistance and add to their receptivity to or “readiness” for rehabilitation.¹⁶

The crucial point is that McShane and lawyer-assistance-program lawyers have a special strength and skill to offer, and while lawyer-assistance-program lawyers have typically employed that skill assisting other lawyers in the throes of addiction and depression, that special strength and skill can also be of great assistance to a great many people caught up in the criminal-justice and mental-health systems. The goal of the present article, therefore, is to encourage lawyer-assistance-program lawyers to consider bringing therapeutic jurisprudence into their law practices, and to encourage judges to consider the ways in which lawyer-assistance-program lawyers might be helpful as well.

There are of course many ways of practicing therapeutic jurisprudence—in the civil as well as in the criminal and juvenile-law spheres—and adding a TJ practice of any type will likely constitute a service to clients and lead to greater satisfaction for the attorney. But given the clear link of alcoholism and addiction with criminal and juvenile issues, the strengths and skills of lawyer-assistance-program lawyers will likely shine through more easily in the practice of those areas. Of course, assistance-program lawyers in long-term recovery who, like McShane, feel comfortable talking about their personal histories, will immediately achieve an added credibility with courts and clients. But lawyers who wish to keep such personal matters personal may still have much to add: they will better understand addiction, alcoholism, mental illness; they will understand family dynamics, triggers and coping mechanisms, and attempts at deception; they will have knowledge about treatments, programs, services, and much more. And by bringing TJ into their law practices, they will be fulfilling the twelfth step of 12-step programs: to “practice these principles in all of our affairs.”¹⁷

9. *Id.* at 194.

10. *Id.* at 193-206.

11. *Id.* at 195.

12. *Id.* at 194.

13. *Id.* at 195.

14. *Id.* at 199-200

15. *Id.* at 200. For some background about John McShane, see Steven Keeva, *Passionate Practitioner*, June 2000, A.B.A.J., at 56, available at http://www.law.arizona.edu/depts/upr-intj/pdf/Passionate_Practitioner.pdf (last visited Oct. 20, 2011).

16. David B. Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COASTAL L. REV. 111 (2006), available at <http://ssrn.com/abstract=929014> (last visited Oct. 20, 2011). Graduation talks given at drug-treatment courts by prosecutors and judges who have themselves been clients of those courts can be especially meaningful. See also Alicia Fabbre, *New Prosecutor Says Drug Court Turned Around Her Life; Assistant State’s Attorney Graduated from Program After Arrest 10 Years Ago*, CHI TRIB, Jan.

19, 2011, available at <http://www.nadcp.org/learn/nadcp-news-events/nadcp-news/-drug-court-participant-assistant-states-attorney> (last visited Oct. 20, 2011). The fact that addiction is an equal-opportunity disease, affecting professionals from both sides of the adversarial fence (and judges as well), allows for some prosecutors and judges better to appreciate a more humanistic TJ approach to the law. For a judge’s story, see Michael J. Murphy, *My Story*, available at <http://www.supremecourt.ohio.gov/Boards/OJFN/resources/murphyM.asp> (last visited Oct. 20, 2011). For a powerful New York Times article about a psychotherapist giving hope to her suicidal patients by disclosing her own troubled history, see Benedict Carey, *Expert on Mental Illness Reveals Her Own Struggle*, N.Y. TIMES, June 23, 2011, p. A1, available at <http://www.nytimes.com/2011/06/23/health/23live.html> (last visited Oct. 20, 2011).

17. For a summary of 12-step programs, see the website of Alcoholics Anonymous at <http://www.aa.org> (last visited Oct. 20, 2011).

Traditional criminal lawyers can easily add a TJ dimension to their practice, and that simple “add-on” is likely to be transformative of their practice and their approach with clients. But as McShane’s criminal-law practice clearly demonstrates, one need not be a criminal *trial* lawyer to practice TJ criminal law—so long as cases are properly and carefully investigated and creative, collaborative arrangements are made with criminal trial lawyers to explore all relevant issues and to litigate cases in appropriate instances.¹⁸ Other areas of practice may require special arrangements with public-defender offices—where private lawyers may be designated for some cases as “special deputy public defenders.” These arrangements may be made in cases of civil commitment of the mentally ill—a particularly fertile area for performing useful pro bono work and, at the same time, developing excellent TJ-type skills and sensitivities.¹⁹ So too, they can be made in misdemeanor cases²⁰ and in cases in drug-treatment court, dependency drug court, juvenile drug court, mental-health court,²¹ and in community courts.²² In some instances, arrangements may also be made with law-school clinical programs,²³ where lawyer-assistance-program attorneys might participate and supervise students in TJ-related cases.

Indeed, these sorts of special arrangements need to be made not only to accommodate lawyer-assistance-program attorneys wishing to work in TJ matters but also to open TJ practice to lawyers in general—perhaps especially to recent law-school graduates. Since representation in problem-solving courts is overwhelmingly engaged in by public-defender offices, a young

lawyer wishing to get some TJ experience will be quite limited in opportunities. Special arrangements with public-defender offices could allow for a pro bono opportunity for private lawyers and could thereby help to ease the crushing caseloads of those defender offices. Further, if the volunteer lawyers are drawn not only from lawyer-assistance programs but are broadly based, the confidentiality of lawyer-assistance-program status may be preserved for those who wish to preserve it. The next step, therefore, is for interested persons and groups—including the courts and the bar—to brainstorm about how these practice avenues may be opened to interested lawyers, and to provide training, materials, and overall encouragement to lawyers—those in lawyer-assistance programs and others—who wish to serve others in achieving a rich and full life.²⁴



David B. Wexler is Professor of Law and Director, International Network on Therapeutic Jurisprudence (INTJ), at the University of Puerto Rico; and Distinguished Research Professor of Law Emeritus, Rogers College of Law, University of Arizona. He is best reached through email at davidBwexler@yahoo.com.

The website of the International Network on Therapeutic Jurisprudence (www.therapeuticjurisprudence.org) contains a wealth of materials about therapeutic-jurisprudence theory and practice; there is also a related Facebook page (www.facebook.com/TherapeuticJurisprudence).

18. For a discussion about how representation may be structured, see REHABILITATING LAWYERS, *supra* note 2, at 193; see also *id.* at 131-132 (noting the need for thinking creatively about the provision of defense legal services). The issue of TJ criminal lawyers who are not “full service” criminal lawyers is an important one deserving careful attention. One possibility would be for the traditional criminal trial lawyer to seek out and collaborate with a TJ criminal lawyer, thereby assuring that all bases are covered for a complete defense and full representation. This type of coordination would be possible not only in private practice but also in public-defender offices if certain TJ specialist attorneys were available on staff—or even on a pro bono basis—to consult with trial lawyers and their clients.

19. See *id.* at 207 (comments by North Carolina attorney Robert Ward about the advantages of representing clients facing civil commitment for acquiring skills important in TJ generally). For one of the classic articles on point, discussing also the structure of representation in civil-commitment cases, see Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBLEMS 161, 173-74 (1982).

20. See Ginger Lerner-Wren, *Applying Therapeutic Jurisprudence (TJ) in a Court of General Jurisdiction*, May 2008 (describing Broward County, Florida, Judge Ginger Lerner-Wren’s use of TJ principles she first practiced in a mental-health court to a regular misdemeanor criminal docket), available at <http://www.law.arizona.edu/depts/upr-intj/intj-gc052008.html> (last visited Oct. 20, 2011).

21. These courts are described in JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 13-92 (Bruce J. Winick & David B. Wexler eds., 2003). All lawyers might enjoy

serving on occasion as a judge in a “teen court” (if such exists in the particular jurisdiction), where the judge is likely to be the only adult in the room. *Id.* at 50. Presiding in a teen court would likely be a very non-threatening way to ease into some TJ professional work. See *id.* at 49-54. There are also some court settings where the focus may appeal especially to certain lawyers. Dependency drug court, for example, often involves addicted mothers threatened with the loss of their children. In some jurisdictions, successful “graduates” of the program serve as “mentor moms,” lending support to women currently caught up in the dependency process. See *id.* at 41-42. Some women lawyer-assistance-program attorneys—especially mothers once themselves worried about the fate of their families—may similarly find work with these clients particularly meaningful and rewarding, and the clients may more easily open up to such attorneys. For the story of a teenage alcoholic mother who turned her life around and became a judge, see Sarah L. Krauss, *My Journey from Alcoholism to Sobriety, Recovery and the Bench*, BAR LEADER, May 1996, available at http://www.tba.org/Journal_TBarchives/nov98/TBJ-nov98-personal.html (last visited Oct. 20, 2011).

22. The Center for Court Innovation provides a variety of materials on community courts on its website at <http://www.courtinnovation.org/topic/community-court> (last visited Oct. 20, 2011).

23. Gregory Baker & Jennifer Zawid, *The Birth of a Therapeutic Courts Externship Program: Hard Labor but Worth the Effort*, 17 ST. THOMAS L. REV. 711 (2005) (discussing the experience of law school clinics at the William and Mary and the University of Miami law schools).

24. See text accompanying note 15, *supra* (quoting statement from brief filed by John McShane).

Reading, Writing, and Interrogating:

Providing *Miranda* Warnings to Students in Schoolhouse Interrogations

Stephanie Forbes

A thirteen-year-old boy sat in a room until a law-enforcement officer arrived. He asked the boy to follow him into another room where three more adults, including another law-enforcement officer, waited. The second law-enforcement officer then proceeded to question the boy about his involvement in a series of home robberies while the other adults encouraged the boy to tell the truth. The boy then implicated himself in the home robberies, acts for which he was later arrested. He claimed that as the officers did not read him his *Miranda* rights, his statement could not be used against him.¹ At first glance, it would appear his privilege against self-incrimination had indeed been violated.² It would have been, except for one fact: he was in school when the police interrogated him.

Miranda v. Arizona responded to concerns over widespread police coercion when interrogating suspects in custody. Taking notice of the “menacing” psychological interrogation tactics employed by law-enforcement officers in custodial interrogations,³ the Supreme Court crafted the ubiquitous *Miranda* warnings that devotees of procedural television “can recite . . . in their sleep.”⁴ The Court noted that “[e]ven without employing brutality . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals,”⁵ and procedural safeguards are necessary to prevent the “[subjugation of] the individual to the will of his examiner.”⁶ The Court has thus far failed to mandate the provision of these crucial warnings to students during school-

house interrogations. But a recent case illustrates the importance of providing *Miranda* warnings to students.

This article will argue that interrogation by a law-enforcement official—including school resource officers—in a school setting is per se custodial interrogation and requires police to give the *Miranda* warnings before questioning students.⁷ It does not propose that all questioning of students that has possible criminal implications requires *Miranda*; questioning performed by school officials in their administrative capacity does not require the warnings.⁸ This article first reviews *Miranda* requirements and the present approach of applying *Miranda* to the school setting. Next, it reviews emerging doctrine on the difference between juveniles and adults in the criminal justice system. The article then argues that the growing phenomenon of school resource officers as law enforcement and power dynamics between school employees and students make schools custodial in nature. Finally, it conducts a case study of *In re J.D.B.*⁹ and concludes that denying *Miranda* rights to students interrogated at school contradicts the purpose behind *Miranda*. A per se custodial interrogation rule equitably resolves these concerns.

REFINING *MIRANDA* AND SCHOOLHOUSE APPLICATION

Almost immediately after deciding *Miranda*, the Court noted clarification was required as to the new procedures, specifically that of custodial interrogation. The *Miranda* Court

1. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”).
2. “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” US CONST. amend. V.
3. *Miranda*, 384 U.S. at 457.
4. Amos N. Guiora, *Creating an Exception to an Exception—Too Dangerous and Too Unwarranted*, JURIST (Apr. 2, 2011), <http://jurist.org/forum/2011/04/creating-an-exception-to-an-exception.php> (Apr. 2, 2011); see also *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (noting the *Miranda* warnings “have become part of our national culture”).
5. *Miranda*, 384 U.S. at 455.
6. *Id.* at 457–58 (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”).

7. Throughout this article, “school” will refer to K-12 schools only. As most of the students in K-12 will be under eighteen, juveniles and students may be used interchangeably, but the proposed rule will apply to all enrolled students regardless of age.
8. “A principal, acting alone and without invoking or outwardly benefiting from the authority of any law enforcement officer may question a student without complying with *Miranda*’s requirements. A student’s answers to such questions will be admissible at subsequent juvenile or criminal proceedings.” Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 40–41 (2006). For analysis of the requirement of *Miranda* warnings when school administrators “act as law enforcement,” see generally *id.* This distinction between law enforcement and school administrators acting pursuant to their administrative duties comports with *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (permitting reasonable warrantless school searches to maintain discipline and safety in schools).
9. 686 S.E.2d 135 (N.C. 2009), *rev’d*, 131 S. Ct. 2394 (2011).

defined custodial interrogation as “questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”¹⁰ *Oregon v. Mathiason*¹¹ provided the Court an opportunity to clarify that definition.

The officers in *Mathiason*, who suspected the defendant of involvement in a home break-in, left a note at his house asking to speak with him. “He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview [he] did in fact leave the police station without hindrance.”¹² The Court also rejected the assertion that “[s]uch a noncustodial situation is . . . converted to one in which *Miranda* applies simply because . . . the questioning took place in a ‘coercive environment.’”¹³ Rejecting a per se custodial rule, the Court noted that “[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law-enforcement system which may ultimately cause the suspect to be charged with a crime,” and the mere fact the interrogation takes place in a police station does not make a noncustodial interview into a custodial interrogation.¹⁴ The Court later created a two-prong test to determine custody: “[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.”¹⁵ In applying *Miranda* to school settings, courts have relied on this objective custody test to justify declining to recognize school interviews as custodial interrogations.¹⁶

The District of Columbia Court of Appeals held that police did not improperly fail to *Mirandize* a student before interrogating him at school about sexually abusing his three-year-old sister.¹⁷ The investigator and principal met J.H. in the hallway and escorted him to a conference room, “which the court estimated would be about 30 feet by 50 feet,” at which time “[t]he principal quickly left without saying anything.”¹⁸ The court noted “J. was not restrained in any way. . . . Investigator Gerald did not say anything ‘one way or another’ about whether J. could leave, and ‘J.H. never asked if he could leave.’ Gerald did not raise his voice. He made no threats or promises.”¹⁹ The

court declined to extend *Miranda* rights, saying “*Miranda* focused upon the pressure inherent in the incommunicado interrogation of individuals in a police-dominated atmosphere,” and that “we cannot conclude as a matter of law that [J.] was in custody when the police interrogated [him], i.e., that [his] freedom of action was curtailed to a degree associated with a formal arrest.”²⁰ Several other courts determined interrogations at schools did not meet the objective *Miranda* custody test,²¹ including a recent case before the Supreme Court.

The Supreme Court of North Carolina recently concluded “a juvenile who made incriminating revelations to law-enforcement officers . . . was not in custody when he incriminated himself” during his questioning at school.²² J.D.B., a thirteen-year-old special-education student, was interrogated by a police officer in a school conference room about a rash of recent thefts.²³ Only after J.D.B. had incriminated himself did the officer inform J.D.B. “that he did not have to speak with him and that he was free to leave.”²⁴ The North Carolina court held “[t]he uniquely structured nature of the school environment inherently deprives students of some freedom of action. However, the typical restrictions of the school setting apply to all students and do not constitute a ‘significant’ deprivation of freedom of action,” falling short of the custodial requirement of *Miranda*.²⁵ The U.S. Supreme Court granted certiorari on another question²⁶ and ultimately reversed and remanded on that basis.²⁷ This article, however, uses the case to argue that given the particular vulnerability of juveniles in interrogatory situations, schoolhouse interrogations by law enforcement satisfy the custody prong of *Miranda*.

The Court later created a two-prong test to determine custody

THE EMERGING “JUVENILES ARE DIFFERENT” JURISPRUDENCE

The Supreme Court has noted that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,”²⁸ and indeed, recent cases indicate an evolving “juveniles are differ-

10. *Miranda*, 384 U.S. at 444.

11. 429 U.S. 492 (1977) (per curiam).

12. *Id.* at 495.

13. *Id.*

14. *Id.*

15. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (footnote omitted).

16. See, e.g., *In re J.H.* 928 A.2d 643, 650–51 (D.C. 2007).

17. *Id.* at 650.

18. *Id.* at 646.

19. *Id.* at 647.

20. *Id.* at 651 (alterations in original) (internal quotation marks omitted).

21. See Marjorie A. Shields, Annotation, *What Constitutes “Custodial Interrogation” Within Rule of Miranda v. Arizona Requiring That Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation—At School*, 59 A.L.R. 6th 393 (2010).

22. *In re J.D.B.*, 686 S.E.2d 135, 136 (N.C. 2009), *rev’d*, 131 S. Ct.

2394 (2011).

23. *Id.* at 136.

24. *Id.* at 137.

25. *Id.* at 138. “For a student in the school setting to be deemed in custody, law enforcement must subject the student to ‘restraint on freedom of movement’ that goes well beyond the limitations that are characteristic of the school environment in general.” *Id.* (quoting *State v. Buchanan*, 543 S.E.2d 823, 827 (N.C. 2001)).

26. “Whether a trial court may consider a juvenile’s age in a Fifth Amendment *Miranda* custody analysis in evaluating the totality of the objective circumstances and determining whether a reasonable person in the juvenile’s position would have felt he or she was free to terminate police questioning and leave.” Brief for Petitioner at i, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121).

27. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406, 2408 (2011) (holding that a child’s age should be included in the custody analysis but not deciding whether J.D.B. was in custody).

28. *In re Gault*, 387 U.S. 1, 13 (1967).

[T]he impulsivity and irresponsibility of juveniles creates a special concern in interrogation situations.

dants who were under eighteen at the time of their crime.²⁹ The Court observed “as the scientific and sociological studies . . . tend to confirm, ‘[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.’”³⁰ The Court additionally pointed to state laws prohibiting “those under 18 years of age from voting, serving on juries, or marrying without parental consent,” as “recognition of the comparative immaturity and irresponsibility of juveniles.”³¹ The Court later determined that life without parole could not be imposed on juveniles for non-homicide offenses in *Graham v. Florida*.³² “As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility;’ they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;’ and their characters are ‘not as well formed.’”³³ The same rationale underlying these decisions justifies treating juveniles in school as in custody for *Miranda* purposes.³⁴

Juvenile Susceptibility to Interrogation: The Next Step in “Kids are Different?”

The Court has declined to move from the standard volun-

ent” jurisprudence. The immaturity and impulsiveness of juveniles formed the basis of the Court’s justification for withholding certain punishments from them. In *Roper v. Simmons*, the Court held the Eighth Amendment prohibited the imposition of capital punishment on defen-

tariness determination of *Miranda* waivers.³⁵ But the impulsivity and irresponsibility of juveniles create a special concern in interrogation situations. Research suggests that interrogation techniques—such as those the *Miranda* Court used as justification for crafting the warnings³⁶—affect juveniles more than adults.³⁷ The risk of false confessions increases with juveniles as “[t]hey think less strategically and more readily assume responsibility for peers than do adults,”³⁸ and “are more likely to comply with authority figures and to tell police what they think the police want to hear.”³⁹ In one study,

[S]ubjects took part in a reaction time task using a computer keyboard. They were then accused of pressing a prohibited key on the keyboard, causing the computer to crash. Half the subjects were then presented with false evidence in the form of a bogus computer printout showing that they had pressed a key they were warned not to touch. All subjects were innocent, and all were prompted to sign a confession.⁴⁰

The study emphasized the special vulnerability of juveniles, finding alarmingly high rates of false confessions: 78 percent in twelve- to thirteen-year-olds, 72 percent for fifteen- to sixteen-year-olds, and 59 percent in eighteen- to twenty-six-year-olds.⁴¹ Although courts may consider age in determining whether a person voluntarily waived his or her *Miranda* rights, the Supreme Court previously declined to mandate consideration of the suspect’s age in the custody determination.⁴² In spite of this refusal, age is not wholly irrelevant in custody analysis. The demographic most likely to falsely confess includes school-age students like J.D.B., and yet courts have been unwilling to afford them *Miranda* protections in the one place they spend the most time.

The State of North Carolina and its amici in *J.D.B.* assert the petitioner’s standard would make age a proxy for location and

29. 543 U.S. 551 (2005).

30. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

31. *Id.*

32. 130 S. Ct. 2011 (2010). Petitions have already been filed in the Supreme Court to extend the ban on juvenile life without parole to homicide crimes. Adam Liptak & Lisa Faye Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. TIMES, Apr. 20, 2011, at A13.

33. *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569–70).

34. See generally *In re J.D.B.*, 686 S.E.2d 135, 142 (N.C. 2009) (Brady, J., dissenting) (“The rationale behind these laws is practical and just. The perceptions, cognitive abilities, and moral development of juveniles are different from those of adults; thus, the law rightly takes this into account when dealing with juvenile offenders.”).

35. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (“We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.”).

36. See *Miranda v. Arizona*, 384 U.S. 436, 449–54 (1966) (describing common psychological interrogation techniques).

37. “[I]nterrogation techniques designed to manipulate adults may be even more effective and thus problematic when used against children. Tactics like aggressive questioning, presenting false evidence, and leading questions may create unique dangers when

employed with youths.” Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 244–46 (2006).

38. *Id.* at 244; see also Brief for the Am. Med. Ass’n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae In Support of Neither Party at 2, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412) (“Adolescents are also more emotionally volatile and susceptible to stress and peer influences.”).

39. Feld, *supra* note 37, at 246.

40. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN THE PUB. INT. 33, 52 (2004).

41. *Id.* at 53. The missing data for fourteen- and seventeen-year-olds is presumably an error.

42. *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (holding in federal habeas case age was not a proper consideration in custody determination). But see *id.* at 669 (O’Connor, J., concurring) (“There may be cases in which a suspect’s age will be relevant to the ‘custody’ inquiry under [*Miranda*].”). The *Yarborough* majority opinion seemingly precludes the success of *J.D.B.* as presented to the Supreme Court. See *supra* note 26. However, it does not impact a decision finding school interrogations are per se custodial.

make the objective custody test too subjective.⁴³ Refocusing on the location of the interrogation—school—rather than the age of the suspect removes this concern. Instead of a juvenile being in custody because he or she is young, he or she is in custody because he or she is in school—“an objective circumstance that is readily observable by officers.”⁴⁴ The age of the suspect simply serves to provide a basis of understanding why he or she may not feel able to terminate the interrogation in school,⁴⁵ and it justifies the creation of a bright-line rule regarding schoolhouse interrogations.

The denial of *Miranda* rights to students in school hinges on the objective custody determination: was the suspect “deprived of his freedom of action in any significant way?”⁴⁶ The North Carolina Attorney General flatly dismissed the assertion that students were in custody for *Miranda* purposes during school hours, claiming “the school setting itself is a familiar one to a student. In that respect, it is less inherently coercive than a police station.”⁴⁷ As *J.D.B.* illustrates, this line of thought ignores the reality that schools are increasingly populated with law-enforcement officials, creating an atmosphere reminiscent of the *Miranda* Court’s “incommunicado interrogation of individuals in a police-dominated atmosphere.”⁴⁸

NONCUSTODIAL CUSTODY?: SCHOOL INTERROGATIONS AS CUSTODIAL INTERROGATIONS

*Officer Krupke Roaming the Halls:*⁴⁹ *The Increasing Presence of Law Enforcement in Schools*

Concerns over school safety have steadily increased since the mid-nineties due to highly publicized school shootings and other violence.⁵⁰ One response to parental and lawmaker

concern has been the presence of school resource officers (SROs) in the educational setting. The Center for the Prevention of School Violence defines an SRO as “a certified law-enforcement officer who is permanently assigned to provide coverage to a school or a set of schools. The SRO is specifically trained to perform three roles: law-enforcement officer; law-related counselor; and law-related education teacher.”⁵¹ Although no national numbers regarding SROs exist, the trend increases yearly.⁵² “[I]n 2004, 60 percent of high school teachers reported armed police officers stationed on school grounds, and in 2005, almost 70 percent of public school students ages 12 to 18 reported that police officers or security guards patrol their hallways.”⁵³ In 2009, it was estimated that 20,000 law-enforcement officers patrolled schools.⁵⁴ As “[l]aw enforcement officer’ means a sworn law-enforcement officer with the power to arrest,”⁵⁵ SROs have the ability to arrest children at school and have increasingly done so,⁵⁶ disproportionately affecting poor, minority, and special-needs students.⁵⁷ Some research has suggested the presence of SROs itself criminalizes student behavior, as “discipline problems traditionally handled by school principals and teachers now are more likely handled by a school police officer [e.g.,] a scuffle between students becomes assault or disrupting class

“The SRO is specifically trained to perform three roles: law-enforcement officer; law-related counselor; and law-related education teacher.”

43. See Brief for the Respondent at 25–28, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121) [*hereinafter* Respondent’s Brief]; see also Brief of the Nat’l District Attorneys Ass’n as Amicus Curiae in Support of Respondent at 9–14, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121) [*hereinafter* NDAA Brief]; Brief for the United States as Amicus Curiae Supporting Respondent at 32, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121) [*hereinafter* United States Brief].

44. Respondent’s Brief, *supra* note 43, at 35.

45. See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (“[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”).

46. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

47. Respondent’s Brief, *supra* note 43 at 36–37 (citations omitted).

48. *Miranda*, 384 U.S. at 445.

49. See *WEST SIDE STORY* (Mirisch Corp. 1961).

50. Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUSTICE 280, 280 (2009).

51. Ctr. for the Prevention of Sch. Violence, *School Resource Officer*, http://www.ncdjdp.org/cpsv/school_resource_officer.html (last visited Oct. 20, 2011); see also VA. CODE ANN. § 9.1-101 (2006) (“‘School resource officer’ means a certified law-enforcement officer hired by the local law-enforcement agency to provide law-enforcement and security services to Virginia public elementary and secondary schools.”).

52. Theriot, *supra* note 50, at 281 (noting the number of SRO pro-

grams have “swelled since the late 1990s,” and “represent a significant and popular trend in school violence prevention”).

53. Catherine Y. Kim & I. India Geronimo, *Policing in Schools: Developing a Governance Document for School Resource Officers in K-12 Schools* at 5, ACLU WHITE PAPER (Aug. 2009) (footnotes omitted), available at http://www.aclu.org/files/pdfs/racial_justice/whitepaper_policinginschools.pdf.

54. Theriot, *supra* note 50, at 281.

55. N.C. GEN. STAT. § 115C-391.1(b)(6) (2009).

56. Kim & Geronimo, *supra* note 53, at 8 (“The number of children arrested or referred to court for school discipline has grown in recent years.”).

57. *Id.* at 9. (“Children of color and students with disabilities are disproportionately represented among these students [referred to courts by schools]. In Florida, Black youth, who represented only 22 percent of the overall juvenile population, accounted for 47 percent of all school-based delinquency referrals; youth with special needs accounted for 23 percent of all school-based referrals.” (footnotes omitted)); see also Peter Price, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 542 (2009) (“[The school-to-prison pipeline] has had a disproportionate impact on poor and minority communities and has dramatically increased the number of juveniles that pass through the criminal justice system. Ironically, this increase has occurred at the same time that overall and juvenile crime rates have declined. A critical component of the pipeline is the role of police officers in the public schools.” (footnotes omitted)).

By giving SROs a place within the school social system, administrators are legitimizing SRO authority in students' eyes.

becomes disorderly conduct.”⁵⁸ Additionally, SROs’ efficiency controlling crime is questionable—most violent crimes by juveniles occur after school hours and outside of school.⁵⁹ Regardless of SROs’ effect on the school violence rate, their presence in hallways impacts students’ feelings of confinement and *Miranda* custodial analysis.

Teachers Command, and Students Obey: Power Dynamics and Custody

The presence of SROs intensifies the inherent power structure of schools by reinforcing students’ low rank in school hierarchy.⁶⁰ In addition to the principal, teachers, and other school administrators, students must now rank themselves against SROs, who carry the force of the criminal law with them.⁶¹ Merely by virtue of holding a social position within the school, children legitimize the authority’s orders within the school.⁶² In determining whether to defer to authority figures, children “consider the location of the event and whether it is within the jurisdiction of the authority. In addition, they view legitimacy with respect to the type of directive issued by the authority.”⁶³ By giving SROs a place within the school social system, administrators are legitimizing SRO authority in students’ eyes. Although it is important for SROs to have author-

ity and the support of school administrators to perform their duties—SROs could hardly be expected to do a good job if the school undermines their authority—school support for SROs and outside law enforcement impacts students’ ability to exercise their rights in an interrogation. The unique nature of school settings only increases the pressure to cooperate with school administrators and law enforcement, including outside law enforcement unaffiliated with the school, “to avoid provoking conflict.”⁶⁴

As courts have observed, “[p]ublic schools have a relationship with their students that is markedly different from the relationship between most governmental agencies . . . and the children with whom they deal.”⁶⁵ Even though the U.S. Supreme Court has held students do not “shed their constitutional rights . . . at the schoolhouse gate,”⁶⁶ the rights students enjoy in school have been sharply curtailed.⁶⁷ If a student believes the officer has the support of the highest authority in the school, the student will be unlikely to believe that he or she has a choice in whether to speak with the officer without incurring disciplinary measures.⁶⁸ “Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order.”⁶⁹ The power dynamics between school authorities and cooperating law enforcement all impact the custody analysis by forming the “circumstances surrounding the interrogation.”⁷⁰

Follow Me Please: A Case Study of *In Re J.D.B.*

The North Carolina Supreme Court erred in holding J.D.B. was not in custody and was therefore not entitled to *Miranda*

58. Theriot *supra* note 50, at 280.

59. OJJDP Statistical Briefing Book—Time of Day, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (Dec. 21, 2010), <http://www.ojjdp.gov/ojstatbb/offenders/qa03301.asp?qaDate=2008> (“Juvenile violence peaks in the afterschool hours on school days and in the evenings on nonschool days. On nonschool days, the incidence of juvenile violence increases through the afternoon and early evening hours, peaking between 7 p.m. and 9 p.m.”); OJJDP Statistical Briefing Book—Comparing Adult and Juvenile Offenders, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (Dec. 21, 2010), <http://www.ojjdp.gov/ojstatbb/offenders/qa03401.asp?qaDate=2008> (“Nearly one-third (29%) of all violent crime committed by juvenile offenders occurs between 3 p.m. and 7 p.m.”).

60. Marta Laupa & Elliot Turiel, *Children’s Concepts of Authority and Social Contexts*, 85 J. OF EDUC. PSYCHOL. 191, 191 (1993) (“In particular, it has been found that children view an authority, such as a teacher, as a member of a social system, that of the school in the case of a teacher.”).

61. See *supra* notes 51–57 and accompanying text.

62. Laupa & Turiel, *supra* note 60, at 191. (“[C]hildren judge that holding a social position in that system is one attribute that legitimizes a teacher’s directives within the social context of the school”).

63. *Id.* at 196.

64. Feld, *supra* note 37, at 230 (“Social expectations of obedience to authority and children’s lower social status make them more vulnerable than adults during interrogation. Less powerful people, such as juveniles or racial minorities, often speak indirectly with authority figures *Miranda* requires suspects to invoke their

rights clearly and unambiguously, a requirement that runs contrary to most juvenile delinquents’ social responses and verbal styles.”).

65. Tenenbaum v. Williams, 193 F.3d 581, 607 (2d Cir. 1999).

66. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

67. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (“[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (“[S]chools do[] not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”). Some Supreme Court justices would go further in curtailing students’ rights at school. E.g., *Morse*, 551 U.S. at 412–13 (Thomas, J., concurring).

68. See Brief of Juvenile Law Ctr., et al. as Amici Curiae in Support of Petitioner at 21, *J.D.B. v. State of North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121) [*hereinafter* JLC Brief] (“In school settings particularly, students may place greater weight on the authority of the adults they encounter . . . [and are] likely to place greater weight on the authority of police officers in the company of school authority figures.”).

69. *Morse*, 551 U.S. at 412–13 (Thomas, J., concurring) (“Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”).

70. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

warnings prior to his interrogation by a juvenile investigator.⁷¹ When considered in conjunction with juveniles' susceptibility to interrogation, the school environment is sufficiently coercive that it warrants a per se rule requiring *Miranda* warnings before school interrogations. "A middle school is a restrictive environment. . . . [M]iddle school students are not free to leave the campus without permission, and visitors to the school, including parents and guardians of students, must upon arrival report their presence and receive permission to be at the facility."⁷² Moreover, the cases cited by opponents of *Mirandizing* students do not support their argument. The State misapplies U.S. Supreme Court precedent and subjects students to the very dangers the *Miranda* Court enacted precautions to prevent.

In *J.D.B.*, an SRO went into J.D.B.'s classroom and escorted him to a conference room where the assistant principal, his intern, and a juvenile investigator from the local police department waited.⁷³ The investigator proceeded to interrogate J.D.B. about home break-ins while the assistant principal urged J.D.B. "to 'do the right thing' and tell the truth."⁷⁴ The court denied J.D.B. was in custody as no one locked the door or restrained the student, and stated: "For a student in the school setting to be deemed in custody, law enforcement must subject the student to restraint on freedom of movement that goes well beyond the limitations that are characteristic of the school environment in general."⁷⁵ The court also denied that the school resource officer's presence "render[ed] that questioning custodial in nature."⁷⁶

North Carolina argued before the Supreme Court that the mere fact that students must attend school does not create custody.⁷⁷ However, the attendance issue sufficiently distinguishes school interrogations from the U.S. Supreme Court cases cited in support. North Carolina cited *Oregon v. Mathiason* for the proposition "that a non-custodial setting is not converted to a custodial one simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a coercive environment like a police station."⁷⁸ But this misapplies the facts in *Mathiason*. The Court in *Mathiason* placed great emphasis on the fact that the defendant "came voluntarily to the police station, where he was immediately informed that he was not under arrest. . . . It is clear from these facts that Mathiason was not in

custody or otherwise deprived of his freedom of action in any significant way."⁷⁹ Mathiason had a choice in going to the police station that students do not have in attending school: "[t]he penalties for failure to attend school can be severe: a youth can be detained, declared a ward of the court, or have criminal liability and even jail time imposed on his or her parents."⁸⁰

Assuming *arguendo* that J.D.B.'s mere presence in school did not render him in custody, his removal to the conference room surely did. J.D.B. was removed from his classroom by a certified law-enforcement officer and escorted to a room containing another law-enforcement officer and two school administrators, whom the student is socialized to obey.⁸¹ As Justice Kagan noted in oral argument: "Do we need either imaginative powers or empirical data to know that when a 13-year-old is brought into a room in his school, taken out of class, four people are there, two are police officers, one is assistant principal, threatened with custody, that that person is not going to feel free to take off and leave?"⁸² "The only logical reason for [the SRO] to escort J.D.B. was to restrain his freedom of movement; J.D.B. had no choice but to comply with his removal from the classroom. . . . Therefore, J.D.B.'s freedom of movement was restricted from the moment he was removed from his classroom" ⁸³ Although "the school setting itself is a familiar one to a student,"⁸⁴ administrative conference rooms likely are not.

Adopting this line of reasoning would severely prejudice students' rights by implying schools are "safe zones" for police interrogations. If being taken out of class by an uniformed officer and held in a room by the authority figures of the school and outside law enforcement is not "'restraint on freedom of movement' that goes well beyond the limitations that are characteristic of the school environment in general,"⁸⁵ it seems unlikely any questioning in schools could ever be considered custodial interrogation under *Miranda*. Indeed, this appears to be the position Justice Scalia took in oral argument: because

The investigator proceeded to interrogate J.D.B. . . . while the assistant principal urged J.D.B. "to 'do the right thing' and tell the truth."

71. *In re J.D.B.*, 686 S.E.2d 135, 136 (N.C. 2009), *rev'd*, 131 S. Ct. 2394 (2011).

72. *Id.* at 143 (Brady, J., dissenting).

73. *Id.* at 138–39 (majority opinion).

74. *Id.* at 144 (Brady, J., dissenting).

75. *Id.* at 138 (majority opinion).

76. *Id.* at 139.

77. Respondent's Brief, *supra* note 43, at 36 ("Even if this Court were to consider the setting in which the statements in this case were made, the questioning of petitioner by law enforcement officers in a school setting did not make the interview custodial."); *see also* United States Brief, *supra* note 43, at 33 ("The Court has, for example, held that the far more restrictive environment of incarceration to serve a sentence in a prison does not automatically constitute 'custody' for *Miranda* purposes, although additional restraints in a prison interview may amount to 'custody.'").

78. Respondent's Brief, *supra* note 43, at 36 (citing *Oregon v.*

Mathiason, 429 U.S. 492 (1977) (per curiam)).

79. *Mathiason*, 429 U.S. at 495 (emphasis added).

80. JLC Brief, *supra* note 64, at 15–16.

81. Laupa & Turiel, *supra* note 60, at 196 ("[T]he principal is generally seen by children as the highest authority in the school.").

82. Transcript of Oral Argument at 13, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (09-11121), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-11121.pdf [hereinafter Oral Argument]; *see also In re J.D.B.*, 686 S.E.2d 135, 143–44 (Brady, J., dissenting) (N.C. 2009) ("That a special investigator from the police department . . . was making a special trip to the school would alert any reasonable middle school student that something serious was taking place . . .").

83. *In re J.D.B.*, 686 S.E.2d at 143–44 (Brady, J., dissenting).

84. Respondent's Brief, *supra* note 43, at 36–37.

85. *In re J.D.B.*, 686 S.E.2d at 138 (quoting *State v. Buchanan*, 543 S.E.2d 823, 827 (N.C. 2001)).

[T]he choice to interrogate in school . . . demonstrates the same kind of psychological manipulation the *Miranda* Court warned against.

room, he had to be in the classroom; and if the school sent him to a place where he could, if he wished, voluntarily speak to the police officers, he had to be there.⁸⁶

This assertion is absurd. There is certainly a difference between being required to be in a classroom learning and being required to accompany a uniformed police officer to go speak with the assistant principal and another law-enforcement officer. One is an everyday occurrence; the other presumably is not.⁸⁷ The court's determination that J.D.B. was not in custody, and was therefore not entitled to notice of his rights, ignores the reality of schools' restrictive nature, the relationships between officials and students, and the interrogation in question. Moreover, the denial of *Miranda* rights to students interrogated by police at school contradicts the very purpose of the *Miranda* warnings.

Upholding the Very Danger *Miranda* Sought To Prevent

The removal of a suspect from familiar surroundings (classrooms) and forcing him "into an unfamiliar atmosphere and [running him] through menacing police interrogation procedures" is the exact kind of psychological coercion that the *Miranda* warnings were designed to thwart.⁸⁸ At no time did any of the four adults in J.D.B.'s case "undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice."⁸⁹ The withholding from students of knowledge about

the right not to incriminate themselves forces them to become complicit in their own prosecutions.⁹⁰

Additionally, the choice to interrogate in school rather than at home, especially in offenses occurring off school grounds, demonstrates the same kind of psychological manipulation the *Miranda* Court warned against: "The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home."⁹¹ Placing a student in a situation where he or she has no advocate, indeed cannot secure one due to his or her lack of knowledge of the right to have one, isolates him or her. In fact, the Court noted isolation was the key feature of coercive interrogations: "To be alone with the subject is essential to prevent distraction and to deprive him of any outside support."⁹² To prevent the wholesale dismantling of students' Fifth Amendment privilege against self-incrimination, there must be a per se rule of custodial interrogation and *Miranda* warnings.

No *Miranda*-Free Zones: Justifications for a Per Se *Miranda* Rule in Schools

The recognition of required *Miranda* warnings when students are interrogated by law enforcement in school protects students' rights and provides a bright-line rule for school officials and law enforcement. Moreover, by limiting it to the school setting, it does not unduly burden law enforcement. Logic dictates that if courts take the special nature of the school environment into account in order to restrict some constitutional rights,⁹³ then courts should also take the school environment into account to strengthen other constitutional rights.

The susceptibility of juveniles to police interrogation techniques and the inherent power structure of schools require *Miranda* warnings to ensure police do not take advantage of students' deference to authority.⁹⁴ If school interrogation is not per se custodial, then schools risk becoming a free zone for officers to interrogate students. Armed with the knowledge *Miranda* cannot enter the school, police would choose to speak to students in schools to avoid warning students of their rights and risking possible interference by parents or other advo-

86. Oral Argument, *supra* note 82, at 33 (statement of J. Scalia).

87. *See id.* at 33 (statement of J. Ginsburg) ("This seventh grader was marched by the school security officer, taken away from his peers, from his class in—put in a room with a closed door with the assistant principal. That is not a normal part of the school day. That's not where he is required to be.").

88. *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

89. *Id.*

90. *See id.* at 466 ("Without the protections flowing from adequate warning and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" (quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting))).

91. *Id.* at 449–50; *see also In re J.D.B.*, 686 S.E.2d 135, 143 (N.C. 2009) (Brady, J., dissenting), *rev'd*, 131 S. Ct. 2394 (2011) ("Law

enforcement in the instant case took advantage of the middle school's restrictive environment and its psychological effect by choosing to interrogate J.D.B. there, instead of at his home or in any other public, more neutral location.").

92. *Miranda*, 384 U.S. at 455.

93. *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) ("[W]e have held that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, and that the rights of students must be applied in light of the special characteristics of the school environment.") (internal citation and quotation marks omitted); *see also supra* note 67 and accompanying text.

94. *In re J.D.B.*, 686 S.E.2d at 147 (Hudson, J., dissenting) ("[T]he school environment, where juveniles are faced with a variety of negative consequences—including potential criminal charges—for refusing to comply with the requests or commands of authority figures, the circumstances are inherently more coercive and require more, not less, careful protection of the rights of the juvenile.").

cates.⁹⁵ “It is troubling that . . . a public middle school, which should be an environment where children feel safe and protected, [could become] a place where a law-enforcement investigator claim[s] a tactical advantage over a juvenile.”⁹⁶ Recognizing a right to receive *Miranda* warnings from law enforcement before school interrogations would protect students’ rights and would not come at the expense of law-enforcement goals nor needlessly restrict school administrators’ abilities to enforce school rules.

Mirandizing students will not “destroy the criminal justice system.”⁹⁷ North Carolina Attorney General Roy Cooper asserted in oral argument that “under [J.D.B.’s] theory, a school resource officer who is going to take a juvenile into a room to talk about a stolen cell phone or bullying, the first thing that he’s got to say is you have the right to remain silent. Now, that, in my opinion, disrupts the communication.”⁹⁸ However the Court has previously noted:

[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.⁹⁹

Police should not be able to claim students should not know of their rights because they may choose to invoke them. The limitation of this per se rule to school settings would also prevent subjective factors from entering into the objective custody determination.

The main concern over extending the *Miranda* custody rule to consider age is that it would completely dismantle *Miranda*’s objective custody determination.¹⁰⁰ By linking the determination to location instead of age, this fear is unfounded. The standard is completely objective: the student is either in school or not. It would not create a “*Miranda* minor” rule, mandating different warnings for all K-12 students in all situations.

Students in school would receive the standard *Miranda* warnings, the standard for determining voluntariness of any waiver would remain the same, and a public safety exception could be read into this rule as it has been in *Miranda*.¹⁰¹ A per se custodial interrogation rule for schools will balance law enforcement needs without sacrificing notice to students of their constitutional rights.

CONCLUSION

The purpose behind *Miranda* was to provide clear guidance to law-enforcement officers as to procedure to ensure people could make informed decisions before waiving their rights. Unfortunately, “police have complied more with the letter than with the spirit of *Miranda*.”¹⁰² As the *J.D.B.* case and others like it illustrate,¹⁰³ law-enforcement officers engage in psychologically intimidating interrogation without taking the small step of informing students of their right not to incriminate themselves. “[W]e can’t simply say ‘we’re not going to do anything. We are not going to tell these children that they don’t have to cooperate with the State in building a case against themselves.’”¹⁰⁴ The time has come for the recognition of a per se custodial interrogation rule when students are questioned by law enforcement at school. Failing to do so would give law-enforcement officers carte blanche to question students at school. The special nature of schools creates the intimidating atmosphere that so concerned the *Miranda* court. There must be a bright-line rule to prevent students’ privilege against self-incrimination from becoming a right in name only.¹⁰⁵



Stephanie Forbes graduated from the William & Mary School of Law in 2011, and she won the American Judges Association’s writing competition for law students with this article. She presently serves as a law clerk to the Honorable Jane Grall of the New Jersey Superior Court, Appellate Division. Forbes received her undergraduate degree in 2008 from Mount Holyoke College. She thanks Professor Paul Marcus and her parents for all their support.

95. For example in *Greene v. Camreta*, a social worker chose to question an elementary school student, allegedly sexually abused, at school “because it is a place where children feel safe and would allow him ‘to conduct the interview away from the potential influence of suspects, including parents.’” 588 F.3d 1011, 1016 (9th Cir. 2009), *vacated as moot* by 131 S. Ct. 2020 (2011).

96. *In re J.D.B.*, 686 S.E.2d at 143 (Brady, J., dissenting).

97. Oral Argument, *supra* note 82, at 38 (statement of J. Breyer) (“Now, what happens to destroy the criminal justice system? You can see from my overstatement, I tend to suspect nothing, but you tell me.”).

98. *Id.* (statement of N.C. Att’y Gen. Roy Cooper).

99. *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

100. See generally Respondent’s Brief, *supra* note 43. See also *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004) (“The *Miranda* custody inquiry is an objective test. . . . The objective test furthers ‘the clarity of [*Miranda*’s] rule,’ ensuring that the police do not need ‘to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.’” (quoting

Berkemer v. McCarty, 468 U.S. 420, 431 (1984) (alterations in original) (citation omitted))).

101. *New York v. Quarles*, 467 U.S. 649, 655 (1984) (holding there is a “public safety exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence”).

102. Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 925 (2007).

103. See generally Shields, *supra* note 21.

104. Oral Argument, *supra* note 82, at 24–25 (statement of Barbara S. Blackman, Attorney of Record for the Petitioner).

105. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary . . . to insure that what was proclaimed in the Constitution had not become but a ‘form of words’ . . . in the hands of government officials.” (internal citation omitted)).



The Resource Page



AN AJA NATIONAL SYMPOSIUM The Politicization of the Judiciary: How to Respond

Friday, May 18, 2012
DoubleTree by Hilton Hotel,
Nashville Downtown
Nashville, Tennessee
Conference Registration Fee: \$195
(Hotel: \$129/night)
<http://aja.ncsc.dni.us/conferences/index.html>

As part of the AJA's midyear meeting, we're presenting a national symposium—*The Politicization of the Judiciary: How to Respond*. The full-day program offers a who's who of the most knowledgeable experts on judicial elections.

To maintain judicial independence, judges must understand how to defend their judicial decisions in an increasingly political, money-driven environment. In 2010, several justices and judges lost their jobs after organized campaigns against them. This is an environment in which judicial decisions may be viewed from the vantage point of third parties who represent particular viewpoints:

- Nearly one-third of all funds spent on state high-court elections in the 2010 election cycle came from noncandidate groups.
- Nearly 40% of all funds spent on state high-court elections came from just 10 groups, including national special-interest groups and political parties.
- Outside groups were responsible for three in four attack ads.

The symposium will present an informative conversation about these issues—with ample participation by judges in attendance—and provide tools for responding to challenges to a fair and impartial judiciary. You will have the chance to discuss your own personal experiences with panelists and other attendees as we work together to consider these challenges.

The speakers are the most knowledgeable people anywhere regarding judicial elections:

- Alaska Supreme Court Justice Dana Fabe, who withstood a strong challenge (focused in part on her ruling in an abortion case) in 2010;
- Former Iowa Supreme Court Justice Michael Streit, who lost his retention election in 2010 after an ouster campaign focused on the court's ruling on same-sex marriage;
- Professor James Gibson (Washington University in St. Louis), the leading expert in academic circles on judicial campaigns and elections;
- Mark White, chair of the ABA Ad Hoc Committee on Judicial Campaign Oversight;
- Philip Nichols and Mark Grebner, two campaign consultants who have assisted judges at all levels in elections throughout the United States;
- K.O. Myers, Director of Research and Programs with the American Judicature Society.

The American Judges Association invites your participation in this symposium. **Note: Space is limited and early registration is advised!**

Attendees at the Friday symposium are also welcome to attend the AJA Board of Governors meeting on Saturday morning. We hope to see you this May in Nashville.



WEBSITES OF INTEREST

The AJA Blog
<http://blog.amjudges.org>

Court Review is published quarterly, but events of interest to judges happen all the time. Current AJA President Kevin Burke has started a blog that fills the gap.

Almost anything that's important to judges is likely to be touched on in the blog, often with links to new reports, articles of interest, or other websites with more information.

Recent blog entries have included:

- Updates on the court-funding crisis, with links to commentaries about problems in funding courts in Florida, New York, and Canada (including a speech by Chief Justice Robert Bauman of the Supreme Court of British Columbia).
- A summary of a new report from Justice at Stake, *The New Politics of Judicial Elections 2009-2010*, which found that the rise in noncandidate TV advertising made the 2010 election cycle the costliest nonpresidential election ever for TV spending in judicial elections. The blog provided a link for downloading the report, as well as a separate link to a Joyce Foundation report on money and politics.
- A report of a recent speech by Florida Bar President Scott G. Hawkins, who suggested that justices of the Florida Supreme Court may be targeted by opposition groups in 2012.
- Notice of a new working group on improving judicial decisions about pretrial release in criminal cases, combined with contact information for those who want to follow the federally funded project.
- A three-step action plan for reducing the chance that a rampant rumor mill will take over your courthouse.
- Guest commentaries, including ones on judicial wellness and court leadership.